United States Court of Appeals

for the Second Circuit

APPENDIX

76-2026

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN FRANZESE,

Petitioner-Appellant.

On Appeal From the United States District Court for the Eastern District of New York

B P/S

APPENDIX FOR APPELLANT

Volume II, pp. 255a – End

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A No.

Q Was there any other law enforcement officers with you?

A No.

Q Any other lawyers there?

A No.

Q You were alone, right?

A Right.

Q What did you tell Talia, sir, Agent Talia?

A I don't know. I don't remember. Because I remembered that Elinore Cordero had a motion in and I would imagine that was what it was about, and I called up and he asked me if I was telling the truth then -- I don't remember.

THE COURT: You don't recall how you answered that question?

THE WITNESS: I don't even remember what type of a conversation it was, what it was about.

MR. PATTISON: May I have this FBI report marked.

THE CLERK: So marked as Respondent's Exhibit A for identification.

xx (So marked.)

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Q I would ask you to read this quietly to yourself and ask you whether it would actually freshen your present recollection of what you told Special Agent Talia on December 10, 1974 (handing).

(Pause.)

A I don't know if that's what I said.

THE COURT: The question is whether that refreshes your recollection.

THE WITNESS: Yes, I remember calling him.

THE COURT: As to what you said to Agent Talia, that is the question.

THE WITNESS: Yes, I know we discussed Elinore, yes.

And he asked me if I was telling the truth at that trial.

Q And what did you tell him then, sir?

A I don't remember.

THE COURT: Does that help you refresh your recollection?

THE WITNESS: I'll --

THE COURT: Read it again.

THE WITNESS: No, it doesn't. I don't know if I said this to him or not.

Q Might you have?

A I might have, yes.

Q You might have told Talia that your evidence testimony at the Franzese trial was true; is that right?

A Yes.

Q But you might not have?

A Right. Well, I wouldn't have told him I was lying.

THE COURT: What is your best recollection?

THE WITNESS: That's what I told him.

Q That you did affirm your testimony, the testimony that you gave at the trial; is that right?

A Yes.

Q And that this FBI 302 is in fact accurate, is that right, sir?

A Like I said, I don't remember. I have no recollection. If this is what the FBI agent says, yes.

THE COURT: No, it 's what you recall.

THE WITNESS: Your Honor, I cannot remember a conversation over a phone over a year ago.

THE COURT: You remembered conversations you had in prison, didn't you?

THE WITNESS: Yes.

Q Ten or some years ago.

THE COURT: Ten years ago.

A I might have, yes.

Q You might have told Talia that your evidence testimony at the Franzese trial was true; is that right?

A Yes.

Q But you might not have?

A Right. Well, I wouldn't have told him I was lying.

THE COURT: What is your best recollection?

THE WITNESS: That's what I told him.

Q That you did affirm your testimony, the testimony that you gave at the trial; is that right?

A Yes.

Q And that this FBI 302 is in fact accurate, is that right, sir?

A Like I said, I don't remember. I have no recollection. If this is what the FBI agent says, yes.

THE COURT: No, it 's what you recall.

THE WITNESS: Your Honor, I cannot remember a conversation over a phone over a year ago.

THE COURT: You remembered conversations you had in prison, didn't you?

THE WITNESS: Yes.

Q Ten or some years ago.

THE COURT: Ten years ago.

A But I framed a man, your Honor, I framed four people. This is not -- that is something to remember, your Honor. Not a phone call to an FBI agent.

THE COURT: How many phone calls have you gotten from FBI agents before this one?

THE WITNESS: Several.

They even call me up on the job.

THE COURT: Do you remember any of the conversations you had?

THE WITNESS: No.

THE COURT: Did any other phone calls ask you to confirm testimony that you had given at the trial?

THE WITNESS: Yes, one other time. When Tony Polisi got a reversal.

THE COURT: What did you say about the testimony then?

THE WITNESS: They didn't ask me about the testimony.

THE COURT: I'm asking you whether any other agent called you and asked you to confirm the testimony you gave at the Franzese trial, besides the letter.

THE WITNESS: No.

BY MR. PATTISON:

Q This was the only phone call that you have had in the past three or four years, sir?

A Yes.

Q The only one?

A Well, another one when Mr. Polisi got a reversal.

Q When was that, sir?

A I don't remember, I don't know.

Q That was 1970, sir, wasn't it?

A Was in 1970?

Q Five years ago, at least.

So in the past five years, had you had any other calls?

A No.

Q Sir, didn't you just say that one of the reasons that you cannot recollect this was because there were many of them and it doesn't stand out in your mind?

A No, I didn't mean it that way.

Q What did you mean, sir?

A That I already received more -- other calls from the FBI agents.

Q That was five or some years, sir?

A No.

Q You haven't received any in the past five years,

right?

A That's the only one.

Q This is the only one?

A The only one.

Q Sir, at the time that you made this call -- now, you said that you were alone, right?

A Yes.

Q As soon as you saw the note you didn't pick up the phone and call, did you, sir?

A No.

Q You didn't feel that you had to?

A I didn't want to get involved.

Q Okay.

You didn't feel that there was any urgency, was there?

A No.

Q The next day agents didn't come to your home, right?

A No.

Q Did anybody else call you at home?

A No, because I work.

Q Saying, "Please answer this notes, very important"?

A No.

Q The day after that did any agents, police

officers, anybody, contact you and urge you to call in answer to this note?

A No.

Q It was voluntary on your own part?

A No, they never --

Q Wasn't it, sir?

A No. They only contacted me once.

Q What I mean is, your making of the phone call was in fact a voluntary act?

A Yes.

Q No one sat in the room with you?

A No.

Q Threatened you in any way?

A No.

Q Intimidated you?

A No.

THE COURT: Did you talk to your wife about this letter when you got it?

THE WITNESS: You mean the note, your Honor?

THE COURT: The letter that you got from Special Agent Putz.

THE WITNESS: I never got a letter -- oh, yes. He left me agents' note, call this number.

THE COURT: The note, did you talk to your

wife about it?

THE WITNESS: Yes. And she told me, call. And I called.

BY MR. PATTISON:

Q But about four or five days passed before you called; isn't that correct?

A Yes.

Q There weren't any Federal charges pending against you then, sir, were there?

A No.

Q 12/10 of last year?

A No.

Q Right?

A No.

Q Were there any local charges pending against you?

A No.

Q State charges?

A No.

Q Did you plan to -- did you think that there was a chance that you might be arrested on any Federal charges or any local charges last year?

A No.

Q You weren't facing a sentence, right?

A No.

Q You weren't trying to get a break from any law enforcement agency, sir?

A No.

Q Were you?

A No.

MR. PATTISON: I don't have any other questions.

THE COURT: Why didn't you say to Special Agent Talia, "I lied at the trial"?

Why didn't you tell him that?

THE WITNESS: Because he must have asked me.

He asked -- because Flynore was recanting the testimony, and at that time, your Honor, I didn't --

THE COURT: Wouldn't that have been helpful to the defendant Franzese, to say that?

THE WITNESS: It would have.

THE COURT: You wanted to help Franzese all these years, didn't you?

THE WITNESS: Yes.

THE COURT: Wouldn't that have been the opportunity?

THE WITNESS: I would have been kind of scared to tell it to the FBI agent, to be completely truthful, I would have scared to tell it to him.

Q Why did you not call the agent?

A Because I didn't want them to bother me on my job.

Q Five or some days have passed since this note, right, and--

A I didn't want them to bother me on my job, they already came on my job before.

Q That was prior to the note?

A That's the reason why I called them four or five days later, I figured that Mr. Putz flew in from Miami and Mr. Thatcher flew in from some other place and they wanted to see me.

Q In those four or five days which elapsed between the receipt, no one visited you at work?

A Right.

Q No one called your job?

A No.

Q You had wanted to help Franzese seven years ago; is that right?

A Yes.

Q But you didn't tell the agents,"I lied at the trial," did you?

A No.

Q As a matter of fact, you didn't even tear

up the note and not make a call, right?

A Right.

Q You took the affirmative action, made a call?

A Right.

Because he came there and wrote a letter and he wanted me to call him and that's what I did. I wouldn't tear up the note. Why should I tear up the note?

THE COURT: Prior to the time that you went to Mr. Votto's office, and tried to get a lawyer to take your case, had any lawyer representing Mr. Franzese or anyone else representing Mr. Franzese contacted you or your wife?

THE WITNESS: Nobody ever contacted me, your Honor, and I'm listed in the Queens dictionary (sic). They contacted my wife.

THE COURT: When?

THE WITNESS: I don't know, your Honor, I think it was about a year ago.

Elinore contacted my wife.

THE COURT: Anyone else?

THE WITNESS: No.

THE COURT: As far as you know?

THE WITNESS: Well, Elinore contacted my wife

and she made a meeting with Elinore and Michael Franzese was at the meeting.

Q What did you hear about this?

A About the meeting?

Q Yes.

A They were asking about the letter. Michael Franseze wanted to -- he heard about the letter and he said, "I'd be very grateful if you would turn it over to me."

And he mentioned something about he would give us $10,000, this is what she told me.

Q So the subject came up?

A Money?

Q Yes.

A Yes.

She says if she has the letter, she would take the time out and look for it, my father would be very grateful and he would, you know --

Q He would what?

A He wouldn't. Michael would give her 10,000. This is what she told me.

Q This is for the trouble of taking the time to find the letter?

A Right.

Q $10,000?

A Yes.

THE COURT: You say that is the sole and only time anyone has ever contacted you --

THE WITNESS: They didn't contact me, they contacted my wife.

THE COURT: Or your wife?

THE WITNESS: Yes, your Honor.

THE COURT: With reference to any testimony that you gave at the trial, right?

THE WITNESS: Yes, your Honor.

They never contacted me.

THE COURT: All right. And that, to your knowledge, is the only time anyone contacted your wife, too?

THE WITNESS: Yes, the only time.

Q What about Elinore Cordero, was she promised money?

A Oh, yes. She told me a whole bunch of things, I seen her with my wife, you know, she was making demands on her for money.

THE COURT: On your wife?

THE WITNESS: No, on the Franzese family.

Q For what, sir?

A She wanted money for her troubles.

Q To do what, what did she want money for?

A Well, to tell the truth, you know, to go back -- to go into court and to tell the truth.

Q Make a motion?

A Yes. Make a motion and tell the truth.

Q She ultimately made the motion?

A Yes.

Q She said that she wouldn't do that until and unless she was paid, wasn't that a fact, sir?

A Well, she never told me that, but what I heard, sir. She wanted money. She pestered the family night and day.

THE COURT: To get it straight, it wasn't Elinore Cordero that made the motion, the defendant Franzese made a motion based on --

MR. PATTISON: Her affidavit formed the basis for the motion.

THE WITNESS: I already had to drive over to her house and bring over food because she was saying that she quit her job and they promised her that and then I know they helped her out in certain things, which she told me, to move and stuff like that, and they took her furniture out of storage and stuff like that, and they helped her to an extent.

Q So she did get some money and material benefits for the affidavit that she signed?

A That's what she told me.

Q And swore to, right?

A That's what she told me.

THE COURT: Did the defendant Potere contact you?

THE WITNESS: I don't know him.

THE COURT: Did you ever meet former Assistant Attorney Michael Gillen since the date of the trial?

THE WITNESS: Yes, I went to his office on Madison Square Garden many, many years ago, just to talk to him.

That was about Life magazine.

Q What did you tell him?

A Mike Gillen?

Q Yes.

A We didn't discuss nothing about the case. I'm talking about in 1969 when I came out and I wanted to sue Life magazine and I asked, you know, I was trying to get some legal --

Q 1969?

Q A Yeah.

Q Was this before you went to see Mr. Edelbaum or after?

A Before. It must have been the week I came out of jail, a couple of weeks after. It was before I seen Edelbaum.

Q Before you went to see Mr. Edelbaum?

A Yes.

Q Did you go and tell Gillen that you wanted to help Sonny Franzese out?

A No.

Q Did you ever tell him that?

A No.

THE COURT: You had a pretty good relationship with Mr. Gillen, didn't you?

THE WITNESS: Yes. As close as a relationship can go as a prosecutor and a witness. That type, you know.

THE COURT: Didn't you feel that you could confide in him that you lied?

THE WITNESS: No.

THE COURT: No?

THE WITNESS: No.

THE COURT: Did you want to retain him as your attorney?

THE WITNESS: I think he's a good lawyer, Mr. Gillen.

THE COURT: Did you want to retain him?

THE WITNESS: Yes.

THE COURT: To sue Life magazine?

THE WITNESS: Yes.

Q What did you plan to sue Life for, sir?

A I didn't sign --

Q Did you have any monetary amount in mind?

A Yes.

Q That you asked for?

What?

A Well, I was asking him if I could sue because I didn't sign nothing. They took pictures of me, they -- you know, there was a writer and a photographer every day we went to court in preparations, taking pictures of us, taking down all -- and they introduced me to this guy as an assistant District Attorney and he was a writer, that guy James Mills.

Q So what did you want to sue Life for? What amount of money did you feel that you were harmed by this?

A I was harmed -- whatever myattorney would tell me, ten million, five million, five dollars, whatever.

I was going to him for advice and if he would take the case.

Q Anything that you could get?

A Anything that I could get . Because they made a promise and they broke it.

THE COURT: Life made a promise?

THE WITNESS: Well, not Life himself, I didn't know -- like I said, I didn't know -- I knew this guy who was the photographer, Bob Peterson, right.

THE COURT: He made the promise?

THE WITNESS: No, but James Mills -- first of all --

THE COURT: What promise did Mills make?

THE WITNESS: That they would give us money for it.

THE COURT: For your story?

THE WITNESS: No, they were taking down notes and stuff like that, and they asked us a few questions, yes. They promised us money, right.

THE COURT: Wre you ready to turn this story over to Life?

THE WITNESS: No. Like I said, your Honor, they were -- while I was being questioned, we gave permission for them to sit there and they sat there and took down notes.

THE COURT: Well, did it involve the same facts

and transactions and crimes that you later testified to?

THE WITNESS: Yes. And they took pictures of me, I let them take pictures of [redacted] First of all, like I said, I was introduced [redacted] James Mills as an Assistant Dist[redacted] and then all of a sudden I find out he's a [redacted]ter.

I didn't want no writers --

THE COURT: Did the story that you were ready to give them implicate the defendant Franzese?

THE WITNESS: Yes. We didn't -- I didn't talk to him like this. As I was talking to [redacted] --

Q This was the murder trial, let's get that straight, not the trial here, is that right?

A Oh, no, the murder trial. And Bob Peterson promised us a thousand dollars for signing a release to our pictures and I got nothing.

When I got home I -- I see James Mills and Bob Peterson and Mr. Gillen says that there isn't really nothing you can sue about, and I went there and they gave me $500, Life magazine.

Q This book, did you ever see it, sir, the book?

A What book?

Q The book that James Mills worte?

A Yes.

Q "The Prosecutor"?

A Yes.

Q You are in that book , right?

A Yes. That wasn't pertaining to that, but that price. See, I thought it was just -- I never knew there was going to be a book written about it, nothing like that. They pulled the wool over all of our eyes.

Q So when you found out that there was a book written --

A I didn't say nothing. Just about the magazine. When the book was written, I didn't contact him, didn't know -- do nothing.

Q But then there was another magazine article?

A No, when it first came out. This happened September 1967.

I was released -- no, '68, September '68, or August Life magazine came out, I was released December 2nd, 1968 and I contacted them right after I came out. And the book came out maybe a year after that or two years, so I never called up, Mr. Wills, Mr. Gillen or nobody when the book came out, just when I first came home, I wanted the money they promised me.

Q Yes.

A And that's it.

Q And part of what the note that they took said -- they took notes about what you said in court, right?

A Yes, they did.

Q And you are saying now that what you said in court was a lie, right?

A Yes.

Q So their notes were in fact lies, wrong, right?

A Yes.

MR. POLLOCK: Objection, your Honor, the notes were an accurate reproduction of what the witness was saying.

THE COURT: Overruled. I will allow it.

Q So what did you get paid then for these notes, sir, $500, did you say?

A Right. You are missing the whole misinterpretation. I was promised by Bob Peterson, a photographer, $5000 for my picture -- a thousand dollars for my picture in Life magazine. I said yes, he recanted, didn't give me the thousand dollars when my picture was taken.

When Icame home, I went to Life and they gave me $500.

When the book came out, I wasn't paid for that, nothing like that.

Q When you went to see Bob Wills, when you went to see the man that took the shots, did you tell them,"You know, the entire article is wrong, what I said was a lie"?

A No.

Q How soon with reference to your visit to see Mr. Edelbaum did this occur, was this before or after you went to see Mr. Edelbaum?

A It could be before or after, but it happened around the same time, not too long, I would say within a month or two months.

THE COURT: Did you realize when you went to Life that it might have been worth more money telling Life that your testimony was a lie than that it was the truth?

THE WITNESS: I wasn't interested in the money. I was interested in this guy that pulled the wall over my eyes, promised me something and I wanted it, that's all.

Q Money?

A That's right. I came out of jail with $50. Right.

Q Right?

A Okay.

Q You said you sent a second letter to

Thomas Mattio?

A Yes.

Q Do you have that letter?

A No.

Q How did you send it to him?

A Same way as the first one. In Danbury, gave it to my wife.

Q Does your wife have it?

A No, she burnt it.

Q Did you ask her?

A No.

THE COURT: You are sure your wife burnt Exhibit --

Q Your wife said that she had burnt Exhibit No. 3 here, --

A That's right.

Q -- right?

And you know that that isn't true, right?

A She said instead of burning that one she burnt the other one.

Q What did the other one say?

A I don't know, your Honor -- Mr. Pattison.

Q Do you have any idea what it might have been about?

custodial influence.

THE WITNESS: Yes.

THE COURT: No, this simple fact. You walk into the same room, under all the same conditions, and the subject is told, "Hired by your lawyer."

Do you think there is a different reaction then when you walked into that room under exactly the same conditions and said "I'm going to give you a test. I am employed by the District Attorney, of the United States Attorney."

Do you think his reaction is any different?

THE WITNESS: There shouldn't be. There might be a small difference, but if the District Attorney as examiner is a good examiner, he should put his subject at ease and he should convince a subject he's running an accurate test.

THE COURT: One more thing.

Does fatigue -- is fatigue reflected in any way in the reaction?

THE WITNESS: Well, I would say no. However, one of our rules is you don't test a subject who is tired or gone through an extensive interrogation all day long.

THE COURT: Is the cooperation of the

defendant an element?

THE WITNESS: Essentially.

THE COURT: One fellow doesn't want --

THE WITNESS: You can't do it.

THE COURT: He has to want to do it?

THE WITNESS: He must consent.

THE COURT: More than consent, does he have to want to do it?

THE WITNESS: If he --

THE COURT: Consent could be given grudingly only because you have to.

THE WITNESS: Right.

If an individual resists the test and moves and does certain things, we could conclude that he is doing it to be evasive.

THE COURT: Subject A has never been tested before; Subject B has been tested ten times.

Do you think that someone can get used to testing, be able to anticipate it?

THE WITNESS: I think so. I think Subject A is a better subject than Subject B.

THE COURT: Any other questions?

BY MR. POLLOCK:

Q . Is the polygraph as reliable as an eyewitness?

A In many cases it's more reliable than an eyewitness.

THE COURT: I have seen eyewitnesses and I have seen polygraph tests, too. You know as a defendant's lawyer if you don't know yet, that's one of the things you'll always argue every time eyewitness testimony comes in, so you are talking about is unreliable testimony.

MR. POLLOCK: But admissible testimony.

THE COURT: Admissible. When you say more or less unreliable, Mr. Kaufman says at times. I thinkthat is pretty good. That is a pretty accurate answer in its generality, at times. Of course.

BY MR. POLLOCK:

Q Have you ever had occasion to give a test to which the result compared with the tests given by the Government resulted in the dismissal of charges?

A Yes.

THE COURT: I read that in the newspaper. I know it happens. It may even happen here if the test is given. Under strict supervision and if there is a multiplicty of tests which eliminates a lot of the variables that were disclosed here, and there are variables and Mr. Kaufman is a polygrapher and I

recollect that from his point of view, and I don't say that he isn't sincere, he sincerely believes that it's reliable.

I must also take into consideration that if polygraph testing were reliabile, Mr. Kaufman would be one of the busiest men in the country, and that he is testifying from personal interest.

I'm not saying that your lying or intentionally lying, but I must weigh all this in the light of that self-interest.

I say, in order to eliminate as many variables as possible, and I don't say the test would be reliable under those circumstances, and I choose my words very carefully because lawyers have a habit of interpreting or misinterpreting, I should say embarrassing and/or misinterpreting a judge's words; by interesting, I am not saying that I would be bound by it, but first I would be surprised if all five witnesses exculpated or inculpated the defendant.

But if they did I would say that kind of testimony would be most interesting.

MR. POLLOCK: I believe that the question has to be answered now by the Government.

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THE COURT: I could only urge the Government to consider it.

MR. PATTISON: I will be glad to answer the question Monday.

That is being unfair. Let me think about it, please.

THE COURT: If the Government buys the underlying supposition that even an unreliable test multiplied a number of times reaches the same result, is entitled at least a close look.

MR. PATTISON: Yes, your Honor, I would say that. I think another matter to be thrown into the mix is the number, multiples, that certainly -- certainly a hundred would be more accurate than ten.

THE COURT: I would --

MR. PATTISON: Ten more accurate than one.

THE COURT: I would like those that are not in this case at the present time to be tested without any information, rehearsal, instruction.

I think that would be convincing to me, if I knew, for example, that Mr. Crabbe, Mr. Matera were brought in and if they said, Number one, they were never at that meeting, it never happened.

Franzese wasn't there, that was -- and that was confirmed by similar tests given to others, I would say that you can't disregard it.

MR.PATTISON: Your Honor, --

THE COURT: If you agree with that supposition then the Government should be interested --

MR. PATTISON: Your Honor, I would also only point out --

THE COURT: -- in following through, because I start off with the suppostion that the Government, too, is interested in either sustaining the position it has taken so far or confessing that they all lied.

MR. PATTISON: Absolutely.

THE COURT: There is nothing wrong with it. It's good for the soul. It may not be good for the record, but good for the soul.

MR. PATTISON: Very good for that, too.

THE COURT: Do you have any questions?

MR. PATTISON: May I ask a few questions?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. PATTISON:

Q Sir, would it be fair to say that a test of this type measures not really whether a man is lying but

whether he thinks he is lying?

A True.

Q Would it be possible if a person, as it were, lived a lie for years and years and years until the point where he really deep down thinks that it's true, might he not reach a point where his physical chemical makeup would react as if it were true?

A I must answer this --

Q Is that possible?

A I must answer this affirmatively. If the man is here and he's lying and he knows he's lying it's going to show. If he doesn't know it, it won't show.

THE COURT: In other words, sometimes an individual can actually believe the lie, it's almost an Ionesco fact, an illusion problem, if you ever saw the play, I think it was King Henry the VIII or the IX where the individual was never -- the Emperor, Emperor somebody believed that he was, he held court and everything else, he really believed it.

THE WITNESS: If he believes he's the Emperor, he has to --

THE COURT: If you ask the Emperor whether he was the Emperor he would say he was, right?

THE WITNESS: Yes.

THE COURT: That's what your point is?

MR. PATTISON: Yes.

Q And, Mr. Kaufman, you said earlier, sir, that one of the many things that you would ask a person, for instance, whether it's done as a relevant area or not, or whether it's done to set a norm, is something such as what is the worst thing you have ever done in your life?

Right?

A No.

Q This would be --

A You say to an individual, I'm just taking that as an example, all right. You might say, "Have you stolen anything in the past ten years?" Or one of the ones that I like to use occasionally is what is the worst thing you've ever done in your life.

And the individual might say something that he did.

Q Sir, let's --

THE COURT: Mr. Pattison, is saying, doesn't this now turn on his personal sense of values?

For example, if you heard the testimony of Mr. Zaher, he thought little of perjuring himself to convict someone who was not his friend.

Yet, he would not think of perjurhing himself if that individual was his friend, and it meant convicting him, or testimony to support a charge.

So aren't we talking about a sense of values established by the individual?

THE WITNESS: We are, and we are talking about a probable known lie question where you see that the individual will probably lie to that question and you must compare that probable known lie question with a relevant question.

THE COURT: I think Mr. Pattison's question is different.

BY MR. PATTISON:

Q Sir, wouldn't you say that it would boil down to your having to ascertain what this man views as good and what he views as bad before you can ask him what is the worst thing he has in fact done?

Maybe taking money from his mother is worst than robbing a bank whom you don't know, stranger, big institution, insurance money, etc., maybe that is relatively innocuous, but if your mother was poor and you knew that if you took something from her she might not eat, might that not be in fact worst?

A It's a possibility. I relate it to myself --

THE COURT: Let me say this to Mr. Pattison, that is what multipliers will rule out, because you must assume that not all the subjects tested will have that distorted sense of values.

MR. PATTISON: I don't know. Because I believe that the names listed aren't what you would call an average random cross-section.

THE COURT: Well --

MR.PATTISON: I believe that every witness, pro and con here , Matera, Zaher, Parks, et al., might have a similar background, view of moral values, etc.

THE COURT: Mr. Kaufman suggested one question that was very personal and might lend itself to that kind of argument, but he might ask other questions that weren't so personal where the evaluation would not be on so personal a nature.

I am not concerned about any of those things, really.

BY MR. PATTISON:

Q What efforts would you make prior to the test to make up your own mind as to what type of questions you would ask?

In other words, would you ask to know about the person's background, family history, economic status

before you make up your mind as to should I ask this as a normal response question or should I not?

A As I indicated --

Q Or is it just more or less of an visceral, instinctive feeling?

A As I indicated before, these tests take a fairly long period of time and the testing -- let's say, for example, the whole procedure takes three hours. The actual test might take forty minutes, so the pretest interpretation and the posttest interpretation takes up the rest of the time.

So it's not just sit down, here are the questions, etc.

Q I understand that.

I'm asking what happens in that two hours twenty minutes prior to the test that you base your testing questions on?

A Right. I check -- I ask them their background. I go into a -- quite a history of them, and learn a great deal about them and then determine what question I will use as a probable known lie.

Q Like what, like suppose a person's background is what, good, bad?

A Well, for example, you might say to an attorney

you've always tried your best in defending a case or in prosecuting a case.

Do you know of any instance where you didn't try your best? Now, if he said, well, lots of times I haven't tried my best. Well, did you ever like, knowingly not try your best? And if he said no, I always knowingly tried my best, I would in my own mind, and excluding anybody here, I would in my own mind say that this is a probable known lie. and I might utilize that.

BY MR. PATTISON:

Q I may not follow you.

THE COURT: This now is -- you are arguing interpretation by the tester. That is still a different problem.

MR. PATTISON: Yes.

THE COURT: That is why I would like two testers. One picked by either side or both picked by the Court on nominations from both sides.

MR. PATTISON: What about three, your Honor?

THE COURT: Can you give me the names of outstanding polygraphers in this area?

THE WITNESS: Yes.

THE COURT: Will you name some?

THE WITNESS: Richard Arthur.

THE COURT: Don't mind naming your competition.

THE WITNESS: Nat Lorendi, who is a former examiner for the New York County District Attorney's Office, and who has been qualified as an expert in this court, Federal Court.

There are some -- are we talking about the New York area?

THE COURT: You can go into New Jersey, Connecticut.

THE WITNESS: In --

THE COURT: As far as Philadelphia.

THE WITNESS: In Boston, we have Charles Zimmerman, who is qualified as an expert in most of the courts of Massachusetts.

THE COURT: All these experts test for both the prosecution and the defense?

THE WITNESS: They have tested for both the prosecution and the defendant, right.

John Reed out in Chicago.

THE COURT: Don't you have more in this area?

THE WITNESS: Well, if you want like the top drawer experts --

THE COURT: Top drawer, yes.

Anything else you want to ask, Mr. Pattison?

MR PATTISON: No.

THE COURT: You, Mr. Pollock?

MR. POLLOCK: Just I would like to ask Mr. Kaufman if he tested Mr. Nicholas Potere.

THE COURT: Objection sustained.

You can state for the record that you offered the findings of Mr. Potere and anybody else who he tested and I am saying for the record I will not take it.

MR. POLLOCK: Your Honor, Mr. Kaufman tested Nicholas Potere; and his associate,yesterday, Mr. Lamber, who is in the courtroom, also tested the petitioner, John Franzese, in the Municiple Correction Center, and I'd offer both tests to this Court.

THE COURT: Who is Mr. Lambert?

MR. POLLOCK: Mr. Kaufman's associate.

MR. Kaufman was unavailable yesterday afternoon.

THE COURT: Those were the two you tested?

MR. POLLOCK: We objection, your Honor.

THE COURT: Objection sustained.

Thank you, Mr. Kaufman.

THE WITNESS: Thank you, your Honor.

THE COURT: We may yet get this kind of evidence before the Court, but only after I've ruled

A No.

I don't remember this letter until she read it to me. I completely forgot about the letters.

Q I believe you said earlier that Elinore wanted money to tell the truth; is that right?

A yes.

Q Is that what you told Talia?

A No.

Q What did you tell him?

A She is a vicious --

Q Concerning Elinore.

A Mr. Zaher stated that he had known Elinore Cordero quite well, and characterized her as a very treacherour and vindictive woman who in his opinion is now putting forth -- right, she works everything to her best -- to the best for her.

Q So in your opinion, she was then at that time putting forth lies for money, etc., right?

A No, she was telling the truth at that time, when she put this motion in.

Q Did you tell Agent Talia what she was saying was true?

A No. I didn't.

Q Did you tell Agent Talia that it was lies?

A No.

Q No?

Then that is wrong?

A Oh, I missed -- misinterpreted what you was trying to say.

Q Did you tell Talia that her affidavits were in fact lies?

A Yes.

Q You told him that?

A Yes.

I didn't say her affidavit was a lie. "Mr. Zaher stated that she is lying and stuff like that. She is a liar."

THE COURT: Did you discuss with Special Agent Talia the content of Elinore Cordero's affidavit?

THE WITNESS: No, your Honor. He really just wanted -- called me up to find out if I was changing my testimony or -- that's about it.

THE COURT: So you do remember the conversation?

THE WITNESS: Yes. Yeah, some of it. You know what I mean.

Q When you said Agent Talia called, that he just wanted to call, that isn't quite accurate, is that right? You called him?

A I called him.

Q So there is no misunderstanding about that.

A Yes.

MR. PATTISON: Your Honor, I don't have any further questions.

THE COURT: Mr. Pollock.

REDIRECT EXAMINATION

BY MR. POLLOCK:

MR. POLLOCK: Your Honor, I would like to ask for a couple of minutes to speak to the witnesses before I continue.

I would ask for a luncheon recess now. There are a couple of questions that I would like to ask the Court after lunch which will necessitate if I have to bring people in or not.

THE COURT: Well, we will resume at 1:45.

MR. POLLOCK: May I have the witness leave, your Honor, I would like to advise the Court what I anticipate doing.

THE COURT: You are going to talk to him, aren't you?

MR. POLLOCK: Not with him.

THE COURT: Somebody will talk to him, won't he?

MR. POLLOCK: This has not to do with him. This had to do with potentional witnesses after lunch. Since this is not a jury trial, I would like to present polygraph witnesses to testify as to polygraph examinations given to subjects in this case.

THE COURT: Do you object to that?

MR. PATTISON: I do object.

THE COURT: Objection sustained.

I will take, if you want to, testimony as to the state of the art of polygraphing.

I will do that so you can make a record of it. But cases thus far have held that the art has not reached that degree of reliability where it's acceptable.

MR. POLLOCK: I would like to bring the Court's attention to two cases in this very court, before the Honorable Judge Weinstein, a case in which somebody came forward and submitted doing the crime, involvling Michael Laino. He was going to allow the polygraph in should the Government decide to go to trial.

MR. PATTISON: No objection to that. I was there.

MR. POLLOCK: I also bring to the Court's attention, the case of Hart and Patch before the Honorable Judge Judd, in which the Government itself gave a polygraph to its witness --

THE COURT: Was there any objection by the defendant?

MR. POLLOCK: No, your Honor. The government was objecting because the witness failed the polygraph and they didn't tell the Government -- the defendant that in the first trial.

MR. PATTISON: that is something else again, your Honor, a totally other issue.

MR. POLLOCK: The polygraph would have been--

MR. PATTISON: The reliability of the polygraph was not the issue.

THE COURT: I know of no case in this circuit, and I had occasion to research it and I had occasion to rule on it, where a polygraph expert was allowed to testify as to the truthfulness of a witness without -- over objection of the other side.

MR. POLLOCK: That would go to a jury trial. Here we have a Court --

THE COURT: I will take testimony as to the state of the art. I will not take his findings, so you

can make a record.

Mr. POLLOCK: May we make provision for a visit during lunch with my client?

THE COURT: Only as far as the marshals feel is convenient and not beyond it.

There are some fifty people here who are visitors. Mr. Franzese is to be given no better treatment than anybody else in this courthouse.

Give him every courtesy every other defendant gets but no more. Numbers don't make the difference with the Court.

MR. POLLOCK: It is not a matter of numbers. We are merely trying to facilitate --

THE COURT: I want to make my point, too.

MR.POLLOCK: Some brothers and sisters are here.

(Luncheon recess taken.)

A F T E R N O O N S E S S I O N

(1:45 o'clock p.m.)

THE COURT: Where is Mr. Zaher?

MR. POLLOCK: Outside the courtroom, your Honor.

I have no further questions to ask of Mr. Zaher.

THE COURT: Will you ask Mr. Zaher to come in, please.

Do you have any further questions of Mr.Zaher, Mr. Pattison?

MR. PATTISON: No, I don't.

THE COURT: You are excused.

Thank you, Mr. Zaher.

(Witness excused.)

THE COURT: Mr. Pattison, let me ask you this:

MR. PATTISON: Yes, sir?

THE COURT: Would the Government consent to polygraph tests of all those who are involved, under ideal circumstances, choosing from a list of polygraph testers, either you choose one and Mr. Pollock choose one, or the Court will chose both on the recommendation of the lawyers?

The thought I had was this: Though polygraph tests, particularly ex parte polygraph tests are clearly not admissible, and there is a lot of authority for it, still it occurred to me, if I had two experts in the field test various people who the Government or the Government's witnesses originally said were there, and the Government witnesses -- I am thinking of Mr. Crabbe, Mr. Matera -- I don't know who else is around.

I understand that --

MR. PATTISON: Florio.

THE COURT: I understand that he is deceased. I think his lawyer told me that.

MR. PATTISON: Franzese.

THE COURT: And the defendant.

Mr. Pollock is ready to offer Mr. Franzese's polygraph --

MR. POLLOCK: And Mr. Matera.

THE COURT: I am not going to take it on an ex parte examination.

If you are going to take a polygraph why didn't you check with the United States Attorney, I don't know whether they would or not, but at least there would be an effort to get consent.

MR. POLLOCK: Nobody is in the room when a

polygraph is going on.

THE COURT: Maybe the fact that you are paying the polygrapher is enough, I don't know. It's unreliable as a test to start with, and --

MR. PATTISON: That is the only problem that I have.

THE COURT: On my way down in the elevator I ran into Judge Judd and asked him about it, and he said it probably was because there was consent.

He didn't even know the case, but that would be the reason.

MR. PATTISON: The only problem that I have with that is the body of scientific knowledge which has in fact built up over the past, particularly, ten or so years, which have caused courts not to use it, not to allow it.

In other words, it is not only that it hasn't reached the affirmative level of scientific -- you know, requisite scientific accuracy, but there has been other evidence showing that it is not in fact accurate, from an affirmative sense.

In other words, that it really is not --

THE COURT: Let me ask you this: Let's assume that we tested Parks, Smith -- I don't know whether they are available --

MR. PATTISON: This is another issue, your Honor.

THE COURT: I am just assuming this for the hypothetical -- Parks, Smith, Zaher --

MR. POLLOCK: Cordero.

THE COURT: -- Cordero, Franzese, Crabbe, Matera -- who else was supposed to have been at that meeting, do you recall, who is still alive?

MR. PATTISON: Polisi.

THE COURT: No. I don't recall that. I recall the evidence better than you do, and that is only because I read it over about five times.

MR. POLLOCK: Potere was not at the meeting.

MR. PATTISON: The Aqueduct Motor Inn meeting?

THE COURT: Yes.

MR. POLLOCK: Florio --

THE COURT: There was other evidence in the case in addition to this, and if the government wanted others tested -- let's assume that all those tests proved one thing or the other, and I don't know the tests never clearly prove it because the tests aren't that clear -- the findings aren't that clear, that either Franzese was or was not -- either the witnesses are testifying that he was there are lying, to prove that he wasn't, or that the witnesses who testified

he wasn't there are lying to prove they were there. So both sets of witnesses would either indicate he was there or not there.

If I had two experts under ideal conditions went through the latest scientific equipment and the latest methods of testing, and all these witnesses and the defendants pointed to one thing, wouldn't that be interesting at least, if not convincing?

MR. PATTISON: It would.

THE COURT: Wouldn't you have to take a look at it?

MR. PATTISON: It is the type of thing that I would rather not answer now, but we might be inclined, but it would be something of course that I would have to check on upstairs.

THE COURT: I'm trying to think this out.

MR. PATTISON: For what it is worth, I think it would be very interesting.

THE COURT: First of all, all those to be tested I think have to be isolated for some time to make sure that no drug or other influence is going to enter into the findings:

Two, I think we have to know something about

the emotional stability or instability of every individual.

Now -- and intelligence background. We might even have to know something aobut the physical function --

MR.PATTISON: Metabolic rate.

THE COURT: That's right, metabolic rate, electrical discharge, degree of perspiring, the --

MR. PATTISON: Under a normal set of circumstances.

THE COURT: I see, I don't know how far you go. Use, as I say, the latest equipment and the best experts; have two experts examine, one to observe and the other examine so that one party can use the other in cross-examining, and then I know the type of question, the manner of question, the tone of questioning all comes into this, and then finally when you get the underlying statistics on it, or facts, then the interpretation of those facts, which is always arguable, and then present it that way.

I say it would be very interesting, and I tell you it might influence me if the experts prove to me that their advances over the years to the present date has been significant, and shows a degree of reliability.

MR.PATTISON: Your Honor, the thing I'm not sure on is would that then allow tests, future tests in other matters, cases done under less exact and less accurate standards.

THE COURT: I think you missed what I first said; In the usual case --

MR. PATTISON: Consent.

THE COURT: -- in the usual case we have one party who says, I'm telling the truth. The other side said, I lied. And for that you have one test and there the variables might make the test unreliable and therefore, inadmissible.

But here, as I say, if I had multiple witnesses undergoing the tests, different personalities, different ages -- they are on different sides of the issues -- I said "if" and that is the big "if" if all this pointed one way or theother, then I think it would be very significant.

MR. PATTISON: I believe it might, your Honor.

THE COURT: I think in a case like this it would lay it to rest one way or the other, either he's entitled to a new trial, and if the Government were convinced, even a dismissal of the indictment, and we would say, "Well, that's it."

I don't know whether we can have five or six

or seven people tested under ideal conditions, but I'm willing to take your expert and let him tell me how far the polygraph field has gone.

MR. POLLOCK: Victor Kaufman is in the room, your Honor.

THE COURT: Bring him up.

MR. PATTISON: My cross-examination, if any, will be based upon no prior knowledge at all that there would be any polygraph evidence offered.

I haven't --

THE COURT: Mr. Pattison, I am telling you because of the way this was done, I will tell you objection sustained, and I will not allow it.

I am not going to allow an expert examination of this kind to come into eviddnce, even nonjury. Because I tell you, nonjunry I wouldn't give it any weight. So be reassured that I can take it in -- through a very different method and say all right, I'll take it and just disregard it.

I don't want to do that. I am trying to define in my own mind how this test could be of value. I know Mr. Kaufman. He's tried to get his testimony in before me before, and I have refused -- I haven't refused you thrice yet, and I don't think you are entitled to that kind of treatment --

MR. KAUFMAN: In the last case, if you remember, the defense declined to put my testimony on.

THE COURT: There you are. And it was barred, wasn't it?

MR. KAUFMAN: No, no.

THE COURT: Did he consent?

MR. KAUFMAN: He consented to the test and on -- during the trial the defense said that they weren't going to utilize my testimony.

THE COURT: But it didn't come in, did it?

MR. KAUFMAN: No.

THE COURT: That's the only question I have. All right.

Please swear Mr. Kaufman in.

V I C T O R K A U F M A N , called as a witness herein, having been first duly sworn by the Clerk of the Court, gave his address as 17 Battery Place, New York City, was examined and testified as follows:

THE COURT: We will find out how reliable polygraphing is.

MR.POLLOCK: Your Honor, may I correct an oversight? Petitioner's Exhibit 6, the letter of June 15th, was marked for identification and not for

evidence.

I, at this time, offer it to the Court.

MR. PATTISON: We will also offer A.

THE COURT: This is quid pro quo.

MR. PATTISON: It is not, but --

THE COURT: Any objection to that?

MR. PATTISON: No.

THE COURT: Let it be marked.

MR. POLLOCK: Objection to his offer.

THE COURT: Objection sustained.

THE CLERK: Petitioner's Exhibit 6, previously marked for identification, is now marked in evidence.

(So marked.)

THE COURT: I am looking at the annotations under 388 in the Criminal Law and I just took this off my bookshelf,"Modern Federal Digest."

I want to see if there is a single Appellate case which holds it's admissible. I don't see one. Here's one in the Ninth Circuit, "Despite strong showing of defendant as to accuracy of polygraphic evidence, Trial Court didn't abuse discretion in rejecting defendant's offer of such evidence."

You can look right through it.

MR. POLLOCK: I don't deny that, but I do believe there is a differentiation between a jury and a Court.

THE COURT: No, sir. There is a case right in here that says it is not. What gives you the idea that I may not be influenced just as improperly as a jury?

MR. POLLOCK: Because I believe the same reason the Court will accept hearsay and statements of that nature.

THE COURT: To a certain extent, yes.

DIRECT EXAMINATION

BY MR. POLLOCK:

Q Mr. Kaufman, where is your place of business?

A 17 Battery Place, New York City.

Q And what do you do there?

What is the name of the place?

A New York Lie Detection Laboratory.

THE COURT: Mr. Kaufman, you formerly did this for the Police Department, as I recall it?

THE WITNESS: Yes.

THE COURT: And I found you qualified on previous occasions.

THE WITNESS: Yes, sir.

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THE COURT: I find Mr. Kaufman qualified.

BY MR. POLLOCK:

Q Now, Mr. Kaufman, how many polygraph examinations have you given?

A More than 10,000.

Q Now, sir, have you ever given a polygraph examination where a Government agency also gave an comparative polygraph examination?

A I have.

Q Can you give us an instance where you gave an examination for the defendant and a subsequent examination done --

THE COURT: This won't make a difference to me, the fact that the Government uses it, too. I know the Government used polygraph. This is one of the reasons I am urging them to go along with this idea.

They are not bound by the polygraph tests either. Let's go to the present art.

Do you do your work the same way as you did it ten years ago, five years ago?

THE WITNESS: No, your Honor.

THE COUPT: What id the difference and when did you change?

THE WITNESS: Well, we have increased our accuracy with the use of a newer and better and more accurate instrument. These things -- these instruments get updated from year to year. Ten years ago, for example, we were using a two-pen, just a pneumograph and a cardioresponse.

Presently, we are using a double pneumograph, a cardiograph and a galvanic, psychogalvanic skin response.

The instruments of ten years ago were a great deal clumsier --

THE COURT: Galvanic measures what?

THE WITNESS: The skin conductivity.

Ten years ago --

THE COURT: Conductive to what, electrical impulses?

THE WITNESS: Yes. There are small electrical impulses on the surface of the skin. When there is stress, the skin conductivity changes because the electrical polarity or sometimes the amount of electricity changes, and this is reflected. It is a stress indication at that particular point. So that is another factor that has been added.

Ten years ago the instruments were simply

not as sensitive as they are today, and the technique improves.

For example, I go to every seminar of the American Polygraph Association. It's a working seminar and we work at it for a week wherein psychologists, psychiatrists, members of the Bar, judges, speak to us about the polygraph technique and the polygraph problems.

I saw that the technique has advanced tremendously in the last ten years. I can recall ten years ago that even our instrumentation was hardly as sensitive as it is now.

I think the fact that the present FBI and various agencies of the Government utilize it is an attestation to the fact that the technique is valid.

In addition to that, businesses utilize it constantly and this, too, is -- attests to its validity.

As far as being a hundred per cent reliable, I don't know anything that is a hundred per cent reliable, or a hundred per cent accurate.

THE COURT: It is not as accurate as an X-ray, is it, or as reliable as an X-ray?

THE WITNESS: Your Honor, may I say this about an X-ray? I have a friend who is dying of cancer who

had X-rays taken a month ago that showed nothing. So, you know, there --

THE COURT: You haven't answered the question.

THE WITNESS: In some cases it's more reliable than an X-ray.

THE COURT: Really?

THE WITNESS: I would say so.

THE COURT: How about a photograph?

THE WITNESS: Is it as reliable as a moving picture of an event, no. Is it as reliable as a photograph?

It could be more reliable than a photograph.

THE COURT: How about a blood pressure machine?

THE WITNESS: That is part of it.

THE COURT: I say, is it as reliable as that?

THE WITNESS: The polygraph is part of it.

THE COURT: I'm talking about the one the doctor uses.

THE WITNESS: They are both the same.

THE COURT: You measure the blood pressure?

THE WITNESS: We measure changes in the blood pressure, we use a psygnomometer, which shows changes in the blood pressure, changes in the reate of the heart beat. Increases in blood volume,

all of which is recorded on the chart.

THE COURT: How do you interpret those changes?

THE WITNESS: Well, we interpret these charts. We use a control type test. We use three types of questions. We use relevant, irrelevant and control.

If the person reacts stronger to the relevant question than as to the control question, we must conclude that there is more stress in the relevant question and I think a reasonable conclusion is that he's more afraid of the relevant question and therefore, is practicing deceit on the relevant question.

THE COURT: Do you find as a general rule that addicts react differently than normal people?

THE WITNESS: There have been quite a few studies and one of the studies is by a Mr. Milton Berman, who is part of the Kentucky Addiction Control Commission and he is a pharmacist, and he says that an addict in his state, in his proper state, if he's on heroin or methadone he should be tested on it; is a reliable subject, you see.

THE COURT: There is no difference?

THE WITNESS: He's a reliable subject.

THE COURT: Is there a difference in reaction?

THE WITNESS: I would say an addict, being under the influence of narcotics would have a dampened reaction across the board.

THE COURT: How about people who are classified as neurotics?

THE WITNESS: Who have a high anxiety level?

THE COURT: Yes.

THE WITNESS: They would react pretty strongly to almost anything.

THE COURT: There are varying degrees of neuroses, aren't thre?

THE WITNESS: Yes.

The only way you can really tell -- we use a stimulation test before we do a regular test, and that is, we ask the individual to write his mother or father's name on a piece of paper and give us five names, and we try and pick out the proper name.

Now, if we are able to pick out the right name out of the five names, we feel we have a good subject for the polygraph technique.

THE COURT: How about people who are psychotic?

THE WITNESS: Well, I think that causes another problem. The question frequently asked of us is a pathological liar, if an individual believes something and it actually didn't happen, I must tell you that if somebody believes something, and even thought it didn't happen --

THE COURT: I would rather go to the medical classification.

How about a psychotic?

THE WITNESS: I am not that well versed in --

THE COURT: Wouldn't you have to know to determine whether the subject is reacting normally or abnormally?

THE WITNESS: We do this in our pre-tests, in our control tests. We also conduct a pre-test interview withthe subject and --

THE COURT: For how long?

THE WITNESS: An hour, hour and a half.

THE COURT: There are varying degrees of psychosis, you know that.

THE WITNESS: Yes.

THE COURT: There are times that doctors can't

tell until they have seen a patient over a period of weeks, months sometimes, whether an individual is suffering.

Well, if psychosis affects the final result in the reaction to the mechanism, how can you read those findings?

THE WITNESS: Well, your Honor, may I say this. I spent the last thirty years of my life in police work and 22 of it in the New York City Police Department.

I wound up in charge of a very active Homicide Squad in Brooklyn, and most of my work has been dealing with people so although I may not know the medical and the psychological terminology of an individual who is suffering from various psychoses, I can tell on the basis of years and years of experience dealing with people whether or not a person is a fit subject who can react to a technique.

THE COURT: Would you feel that your findings would be more reliable if the individual went through a psychiatric examination, physical test and was found to be normal before you started testing?

THE WITNESS: Oh, I think it would help.

I think anything would help.

THE COURT: On your method of interpreting what you find, the variations in the reactions to relevant questions and the irrelevant questions, how do you interpret it?

THE WITNESS: As I indicated earlier, we have bases on which to work. The general rule for interpreting it would be -- for example, if someone said to me, What was the worst thing that you ever did in your life?"

And I might say, "Oh, boy, this is some question,"but I would say, "The worst thing I ever did in my life was steal from my mother, because I don't want to tell the examiner the worst thing I ever did in my life and then the question would be, "Was the worst thing you ever did in your life stealing from your mother?"

Then I would say "Yes." Then if I reacted stronger to that than to the question, did you robe the Third National Bank on June 5th, 1975? Certainly that question would cause me more -- cause a greater reaction, cause more stress, and we can conclude that this question was more important to me than the question of the bank and I would not be that

concerned about the question of robbing the bank.

So that conclusion would be there, that he was telling the truth with respect to robbing the bank.

THE COURT: So you first establish a standard for this individual?

THE WITNESS: Yes.

THE COURT: Of his reactions?

THE WITNESS: Right.

THE COURT: Then from there you start questioning?

THE WITNESS: Right.

THE COURT: Let me ask you this, once --

THE WITNESS: May I add one more thing, your Honor?

THE COURT: Yes.

THE WITNESS: There is another technique that we find has the greatest reliability of all, and that is, I just finished a case where an individual was supposed to have killed somebody and taken the television set out of the apartment.

Now, the defendant said,"I wasn't there. I don't know what was taken out of that apartment." Well, we ran a test: Did you take a hi-fi? Did you

take a television? Did you take a toaster? Did you take a radio? Did you take any jewelry?

Now,if the man reacted to the television set, I'd know that at least he knows more about this case than he told me, and he's probably the one that did it. If he reacted flat across the board, opr even nervous across the board, I must conclude that he didn't know about the television set and that he didn't do it.

THE COURT: Let me ask you this: Does an individual react more favorably, and by more favorbaly I say indicating noncriminal conduct, when he knows that you were the tester hired by his lawyer than if you were the tester hired by the prosecution?

THE WITNESS: I hope not.

I think all the members of the Bar will say that my conclusions are my conclusions and I don't care --

THE COURT: I am not talking about your findings.

THE WITNESS: You mean there would be more stress then if it were done in a police station than my office, perhaps?

THE COURT: That is a different question. I know there would be more because you have a

custodial influence.

THE WITNESS: Yes.

THE COURT: No, this simple fact. You walk into the same room, under all the same conditions, and the subject is told, "Hired by your lawyer."

Do you think there is a different reaction then when you walked into that room under exactly the same conditions and said "I'm going to give you a test. I am employed by the District Attorney, of the United States Attorney."

Do you think his reaction is any different?

THE WITNESS: There shouldn't be. There might be a small difference, but if the District Attorney as examiner is a good examiner, he should put his subject at ease and he should convince a subject he's running an accurate test.

THE COURT: One more thing.

Does fatigue -- is fatigue reflected in any way in the reaction?

THE WITNESS: Well, I would say no. However, one of our rules is you don't test a subject who is tired or gone through an extensive interrogation all day long.

THE COURT: Is the cooperation of the

defendant an element?

THE WITNESS: Essentially.

THE COURT: One fellow doesn't want --

THE WITNESS: You can't do it.

THE COURT: He has to want to do it?

THE WITNESS: He must consent.

THE COURT: More than consent, does he have to want to do it?

THE WITNESS: If he --

THE COURT: Consent could be given grudingly only because you have to.

THE WITNESS: Right.

If an individual resists the test and moves and does certain things, we could conclude that he is doing it to be evasive.

THE COURT: Subject A has never been tested before; Subject B has been tested ten times.

Do you think that someone can get used to testing, be able to anticipate it?

THE WITNESS: I think so. I think Subject A is a better subject than Subject B.

THE COURT: Any other questions?

BY MR. POLLOCK:

Q Is the polygraph as reliable as an eyewitness?

A In many cases it's more reliable than an eyewitness.

THE COURT: I have seen eyewitnesses and I have seen polygraph tests, too. You know as a defendant's lawyer if you don't know yet, that's one of the things you'll always argue every time eyewitness testimony comes in, so you are talking about is unreliable testimony.

MR. POLLOCK: But admissible testimony.

THE COURT: Admissible. When you say more or less unreliable, Mr. Kaufman says at times. I thinkthat is pretty good. That is a pretty accurate answer in its generality, at times. Of course.

BY MR.POLLOCK:

Q Have you ever had occasion to give a test to which the result compared with the tests given by the Government resulted in the dismissal of charges?

A Yes.

THE COURT: I read that in the newspaper. I know it happens. It may even happen here if the test is given. Under strict supervision and if there is a multiplicty of tests which eliminates a lot of the variables that were disclosed here, and there are variables and Mr. Kaufman is a polygrapher and I

recollect that from his point of view, and I don't say that he isn't sincere, he sincerely believes that it's reliable.

I must also take into consideration that if polygraph testing were reliabile, Mr. Kaufman would be one of the busiest men in the country, and that he is testifying from personal interest.

I'm not saying that your lying or intentionally lying, but I must weigh all this in the light of that self-interest.

I say, in order to eliminate as many variables as possible, and I don't say the test would be reliable under those circumstances, and I choose my words very carefully because lawyers have a habit of interpreting or misinterpreting, I should say embarrassing and/or misinterpreting a judge's words; by interesting, I am not saying that I would be bound by it, but first I would be surprised if all five witnesses exculpated or inculpated the defendant.

But if they did I would say that kind of testimony would be most interesting.

MR. POLLOCK: I believe that the question has to be answered now by the Government.

THE COURT: I could only urge the Government to consider it.

MR. PATTISON: I will be glad to answer the question Monday.

That is being unfair. Let me think about it, please.

THE COURT: If the Government buys the underlying supposition that even an unreliable test multiplied a number of times reaches the same result, is entitled at least a close look.

MR. PATTISON: Yes, your Honor, I would say that. I think another matter to be thrown into the mix is the number, multiples, that certainly -- certainly a hundred would be more accurate than ten.

THE COURT: I would --

MR. PATTISON: Ten more accurate than one.

THE COURT: I would like those that are not in this case at the present time to be tested without any information, rehearsal, instruction.

I think that would be convincing to me, if I knew, for example, that Mr. Crabbe, Mr. Matera were brought in and if they said, Number one, they were never at that meeting, it never happened.

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Franzese wasn't there, that was -- and that was confirmed by similar tests given to others, I would say that you can't disregard it.

MR.PATTISON: Your Honor, --

THE COURT: If you agree with that supposition then the Government should be interested --

MR. PATTISON: Your Honor, I would also only point out --

THE COURT: -- in following through, because I start off with the suppostion that the Government, too, is interested in either sustaining the position it has taken so far or confessing that they all lied.

MR. PATTISON: Absolutely.

THE COURT: There is nothing wrong with it. It's good for the soul. It may not be good for the record, but good for the soul.

MR. PATTISON: Very good for that, too.

THE COURT: Do you have any questions?

MR. PATTISON: May I ask a few questions?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. PATTISON:

Q Sir, would it be fair to say that a test of this type measures not really whether a man is lying but

whether he thinks he is lying?

A True.

Q Would it be possible if a person, as it were, lived a lie for years and years and years until the point where he really deep down thinks that it's true, might he not reach a point where his physical chemical makeup would react as if it were true?

A I must answer this --

Q Is that possible?

A I must answer this affirmatively. If the man is here and he's lying and he knows he's lying it's going to show. If he doesn't know it, it won't show.

THE COURT: In other words, sometimes an individual can actually believe the lie, it's almost an Ionesco fact, an illusion problem, if you ever saw the play, I think it was King Henry the VIII or the IX where the individual was never -- the Emperor, Emperor somebody believed that he was, he held court and everything else, he really believed it.

THE WITNESS: If he believes he's the Emperor, he has to --

THE COURT: If you ask the Emperor whether he was the Emperor he would say he was, right?

THE WITNESS: Yes.

THE COURT: That's what your point is?

MR. PATTISON: Yes.

Q And, Mr. Kaufman, you said earlier, sir, that one of the many things that you would ask a person, for instance, whether it's done as a relevant area or not, or whether it's done to set a norm, is something such as what is the worst thing you have ever done in your life?

Right?

A No.

Q This would be --

A You say to an individual, I'm just taking that as an example, all right. You might say, "Have you stolen anything in the past ten years?" Or one of the ones that I like to use occasionally is what is the worst thing you've ever done in your life.

And the individual might say something that he did.

Q Sir, let's --

THE COURT: Mr. Pattison, is saying, doesn't this now turn on his personal sense of values?

For example, if you heard the testimony of Mr. Zaher, he thought little of perjuring himself to convict someone who was not his friend.

Yet, he would not think of perjurhing himself if that individual was his friend, and it meant convicting him, or testimony to support a charge.

So aren't we talking about a sense of values established by the individual?

THE WITNESS: We are, and we are talking about a probable known lie question where you see that the individual will probably lie to that question and you must compare that probable known lie question with a relevant question.

THE COURT: I think Mr. Pattison's question is different.

BY MR. PATTISON:

Q Sir, wouldn't you say that it would boil down to your having to ascertain what this man views as good and what he views as bad before you can ask him what is the worst thing he has in fact done?

Maybe taking money from his mother is worst than robbing a bank whom you don't know, stranger, big institution, insurance money, etc., maybe that is relatively innocuous, but if your mother was poor and you knew that if you took something from her she might not eat, might that not be in fact worst?

A It's a possibility. I relate it to myself --

THE COURT: Let me say this to Mr. Pattison, that is what multiples will rule out, because you must assume that not all the subjects tested will have that distorted sense of values.

MR. PATTISON: I don't know. Because I believe that the names listed aren't what you would call an average random cross-section.

THE COURT: Well --

MR.PATTISON: I believe that every witness, pro and con here , Matera, Zaher, Parks, et al., might have a similar background, view of moral values, etc.

THE COURT: Mr. Kaufman suggested one question that was very personal and might lend itself to that kind of argument, but he might ask other questions that weren't so personal where the evaluation would not be on so personal a nature.

I am not concerned about any of those things, really.

BY MR. PATTISON:

Q What efforts would you make prior to the test to make up your own mind as to what type of questions you would ask?

In other words, would you ask to know about the person's background, family history, economic status

before you make up your mind as to should I ask this as a normal response question or should I not?

A As I indicated --

Q Or is it just more or less of an visceral, instinctive feeling?

A As I indicated before,these tests take a fairly long period of time and the testing -- let's say, for example, the whole procedure takes three hours.

The actual test might take forty minutes, so the pretest interpretation and the posttest interpretation takes up the rest of the time.

So it's not just sit down, here are the questions, etc.

Q I understand that.

I'm asking what happens in that two hours twenty minutes prior to the test that you base your testing questions on?

A Right. I check -- I ask them their background. I go into a -- quite a history of them, and learn a great deal about them and then determine what question I will use as a probable known lie.

Q Like what, like suppose a person's background is what, good, bad?

A Well, for example, you might say to an attorney

you've always tried your best in defending a case or in prosecuting a case.

Do you know of any instance where you didn't try your best? Now, if he said, well, lots of times I haven't tried my best. Well, did you ever like, knowingly not try your best? And if he said no, I always knowingly tried my best, I would in my own mind, and excluding anybody here, I would in my own mind say that thisis a probable known lie. and I might utilize that.

BY MR. PATTISON:

Q I may not follow you.

THE COURT: This now is -- you are arguing interpretation by the tester. That is still a different problem.

MR. PATTISON: Yes.

THE COURT: That is why I would like two testers. One picked by either side or both picked by the Court on nominations from both sides.

MR. PATTISON: What about three, your Honor?

THE COURT: Can you give me the names of outstanding polygraphers in this area?

THE WITNESS: Yes.

THE COURT: Will you name some?

THE WITNESS: Richard Arthur.

THE COURT: Don't mind naming your competition.

THE WITNESS: Nat Lorendi, who is a former examiner for the New York County District Attorney's Office, and who has been qualified as an expert in this court, Federal Court.

There are some -- are we talking about the New York area?

THE COURT: You can go into New Jersey, Connecticut.

THE WITNESS: In --

THE COURT: As far as Philadelphia.

THE WITNESS: In Boston, we have Charles Zimmerman, who is qualified as an expert in most of the courts of Massachusetts.

THE COURT: All these experts test for both the prosecution and the defense?

THE WITNESS: They have tested for both the prosecution and the defendant, right.

John Reed out in Chicago.

THE COURT: Don't you have more in this area?

THE WITNESS: Well, if you want like the top drawer experts --

THE COURT: Top drawer, yes.

Anything else you want to ask , Mr. Pattison?

MR PATTISON: No.

THE COURT: You, Mr. Pollock?

MR. POLLOCK: Just I would like to ask Mr. Kaufman if he tested Mr. Nicholas Potere.

THE COURT: Objection sustained.

You can state for the record that you offered the findings of Mr. Potere and anybody else who he tested and I am saying for the record I will not take it.

MR. POLLOCK: Your Honor, Mr. Kaufman tested Nicholas Potere; and his associate,yesterday, Mr. Lamber, who is in the courtroom, also tested the petitioner, John Franzese, in the Municiple Correction Center, and I'd offer both tests to this Court.

THE COURT: Who is Mr. Lambert?

MR. POLLOCK: Mr. Kaufman's associate.

MR. Kaufman was unavailable yesterday afternoon.

THE COURT: Those were the two you tested?

MR. POLLOCK: We objection, your Honor.

THE COURT: Objection sustained.

Thank you, Mr. Kaufman.

THE WITNESS: Thank you, your Honor.

THE COURT: We may yet get this kind of evidence before the Court, but only after I've ruled

out to some extent that it's possible the variables or at least minimize the effect that they would have.

(Witness excused.)

THE COURT: I would strongly urge the Government to go along with it, and invite any other suggestions you have.

MR. PATTISON: We may very well agree.

THE COURT: Incidentally, Mr. Kaufman, I'd ask you to hold your findings on both these subjects, because it may be that they will be tested again by others and it will be interesting to see whether or not they differ, if they do differ.

I'd appreciate that. So you may be back again in this case.

MR. POLLOCK: The problem which concerns me now is the course of the proceedings is somewhat altered by what Mr. Pattison is going to do with the Court's request.

THE COURT: Go on -- did you think that this evidence was going to be admitted?

MR. POLLOCK: I was hopeful, your Honor, yes.

THE COURT: All right. Now, realistically, you felt that it was going -- that it was not going to be admitted.

MR. POLLOCK: Yes.

THE COURT: All right.

Now, I sustain the objection.

Go on as if I didn't suggest the other tests? This can always come in. I'm not sure they are going to agree. I don't know what Mr. Pattison may have to do to shake up the higher ups into agreeing to this.

MR.POLLOCK: May I leave the courtroom for a moment?

MRs. Zaher is in the courtroom. I have not spoken to her since the day she was in the courtroom here and I don't know what she is going to do.

THE COURT: Neither do I. Bring her in. You might say, Mr. Pattison, to the higher-ups that I don't think this will create any precident at all.

MR.PATTISON: I don't know that.

THE COURT: Under these special circumstances, where we have four or five or six people tested under these circumstances, I think it's indeed a rare case that will occur, and if another case does occur under similar circumstances, if the Government agrees that this is -- this has a tint, if not a full show of reliability, then it may be good to do

it that way.

MR.PATTISON: It might, your Honor. I just -- it is just a relatively novel thought and -

THE COURT: In most cases it is a single witness where a defendant says he's lying and of course, under those situations I would never take it. Not never, I'm talking about to this point. Never is too long a time.

Ultimately polygraphing may show its reliability.

MR.POLLOCK: Mrs. Zaher is in the courtroom pursuant to a request of mine.

She has informed me she will not testify unless the Court wants to hear her.

THE COURT: Mrs. Zaher?

MRS. ZAHER: Yes.

THE COURT: Take the stand. You understand we don't need a witness' consent to testify.

MRS. ZAHER: I understand that. That's why I'm here.

THE COURT: It's only if they are asked questions that might tend to incriminate that you have a constitutional right, but everyone is required to give testimony.

Swear her in.

ANN ZAHER, called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE COURT: Do you represent Mrs. Zaher, Mr. Votto?

MR. VOTTO: Yes, your Honor.

THE COURT: So you have a lawyer.

If he wants to raise any constitutional questions for you he's available.

Do you have any questions, Mr. Pollock?

Mr. Votto does represent you, doesn't he?

THE WITNESS: Yes, he does.

DIRECT EXAMINATION

BY MR. POLLOCK:

Q Mrs. Zaher, I show you Petitioner's Exhibit 3 and ask you if you have seen that letter before?

A Yes, I have.

Q When was the first time you saw that letter?

A When my husband gave it to me in Danbury -- when he was incarcerated in Danbury, Connecticut.

Q When was that?

A It was in the Spring of 1966. I don't know what date this was.

Q Did you show that letter to anybody?

A Yes. I showed the letter to Thommy Mattio.

Q Where did you show it to him?

A In Forrest Park near the carousel.

Q Mrs. Zaher, I show you Petitioner's Exhibit 6 in evidence and ask you if you have seen that letter before?

A Yes. My husband sent that letter to me from Connecticut.

Q Is that letter, the date of that letter, the date it was written or thereabouts?

A Yes. It would be about the time I received the letter.

Q And does that letter make mention of the fact that -- of the letter, Petitioner's Exhibit 3?

A Yes, it does.

Q Is that what it refers to?

A Yes, it odes.

Q Now, Mrs. Zaher, in July of 1965 you went on vacation, did you not?

A Yes, I did.

Q Where did you go?

A I went upstate New York to the North Pole, Santa Claus Village, Land of Make Believe, Frontier Town,

Story Town, and all those places of entertainment for children.

Q You had two little girls at the time; is that correct/

A Yes, I did.

Q How many places did you stop at on that vacation?

A Oh, I hope I can remember them all. I know I was in the Land of Make Believe. I know I was in Story Town, I think I was in Fantasy Land, Frontier Land, the North Pole, and maybe other places along the way.

Q What was the last place you went to?

A The North Pole, we worked our way up to it.

Q How many days did it take you to reach --

A I'm not exactly sure. I was away -- roughly, I was away two weeks and I came back pretty much from the North Pole, but I don't remember exactly.

Q How long did you stay at the North Pole?

A A couple of days.

Q How long did it take you to get back?

A I'm not sure. That was our last stop. We started for home right from there.

Q What date did you get back?

A It may have been -- I can't tell you exactly the

day. It was about ten years ago.

Q Approximately?

A I would say it was either the 4th, the 5th, the 6th. It was the early part of August.

MR. POLLOCK: Can I have this marked for identification.

THE CLERK: Postcard marked Petitioner's Exhibit 7 for identification.

xxx (So marked.)

BY MR. POLLOCK:

Q Mrs. Zaher, have you ever seen this postcard before?

A Yes.

It's a postcard I sent to my mother-in-law.

Q Was that sent from the North Pole?

A Yes, it was.

Q Was that your last stop?

A Yes, it was.

Q Did it take you in excess of a week to get up to the North Pole?

A Yes, it did. Because we stopped at other places.

Q And the date on that postcard is what?

A July 31st, 1965.

Q Now, do you have any recollection --

MR. POLLOCK: I'd offer this in evidence, your Honor.

MR. PATTISON: May I see it?

May I just ask one or two questions?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. PATTISON:

Q This says Santa's Workshop, North Pole, New York.

That is around where?

A Wilmington, New York.

Q What city? Lake George, is it around there?

A Past Lake George, because I stayed at Lake George on my way there.

Q How far past Lake George?ABout, do you recall?

A I really don't recall, no. It took me longer to travel back and forth because at that time my daughter was a year and a month old, so traveling was, you know, a little more handicapped. We had to stop for fresh milk, I had two little children so we didn't travel as fast as we might now.

Q Is it more than six hours away from here?

A More than six hours to get there?

Q Yes.

A Yes, it is. I believe it is definitely more than six hours to get to North Pole, yes.

Q More than eight hours?

A I guess depending on how you drive and how you stopped. I would think so. It would take me longer than eight hours to get there.

It's not too far from Montreal, I believe. You are not too far from the Canadian border when you are up there.

MR. PATTISON: Thank you.

DIRECT EXAMINATION

BY MR. POLLOCK: (Cont.)

THE COURT: Let it be marked.

MR. PATTISON: No objection.

THE CLERK: Petitioner's Exhibit 7 previously marked for identification, is now received in evidence.

(So marked.)

BY MR. POLLOCK:

Q Now, Mrs. Zaher, you said you got back approximately August 4th or 6th?

A Or 5th or 6th, some part of that early week of August.

Q And you were away for two weeks?

A Approximately.

It could have been 13 days, 12 days, approximately.

Q Now, Mrs. Zaher, did you have any treatments, any physical ailments during this period of time?

A Yes, I had a lymph gland infection, and I was treated for it prior to the time I went away.

Q What was the last date you were treated by the doctor regarding that infection?

A July 17th.

Q And you've checked that with the doctor?

A Yesterday.

Q Mrs. Zaher, approximately how long after that did you go upstate?

A It was a couple of days.

I'm really -- I have to be honest, I'm not positive. It could have been the next day, it could have been three or four days later, I'm not sure. Ten years has past, and I'm sorry, I can't be accurate with dates.

Q Does the date July 26th mean anything to you?

A It's my sister's birthday.

Q Were you home in 1965 on your sister's birthday?

A No.

Q You were already away?

A I'm positive I wasn't. I was away.

MR. POLLOCK: I have no further questions for the witness, your Honor.

MR. PATTISON: May I have just a moment, your Honor.

(Pause.)

DIRECT EXAMINATION

BY MR. POLLOCK: (Cont.)

Q Was your husband with you on this trip?

A Yes, he was.

MR. POLLOCK: Thank you.

THE COURT: I thought that was the point of the examination.

MR. POLLOCK: It was. I didn't know if I asked her. I'm sorry.

THE COURT: I assume that when someone said Blackie was sending their best regards and having a wonderful time, that he was there?

THE WITNESS: May I say something, your Honor?

THE COURT: You better wait for questions. You may say the wrong thing.

MR. PATTISON: No other questions, your Honor.

THE COURT: You may step down.

MR. POLLOCK: I have another question.

REDIRECT EXAMINATION

BY MR. POLLOCK:

Q Mrs. Zaher, did you ever show that postcard to agents of the FBI?

A I believe I may have, because I did show them postcards when my husband was originally arrested.

Mr. Pollock, may I say in 1965, I didn't drive. So wherever we went, it took longer because Blackie did all the driving.

Q Mrs. Zaher, the question is this, in 1965, when your husband was arrested, was there inquiry as to whether or not he was involved in the bank robbery of July 30th?

A Yes.

Q Did you produce postcards showing him to be away on that date?

A Yes, I did. To the agents in my home, I did.

Q And you showed those postcards at that time?

A It may have been other postcards, but I showed postcards with dates showing he was not in New York City at that time.

THE COURT: To whom did you show them?

THE WITNESS: I'm positive, whatever agents were at the house.

THE COURT: Do you know Agent Putz?

THE WITNESS: I met him in 1965.

THE COURT: Do you know whether he showed it to him?

THE WITNESS: I don't remember.

THE COURT: Anything further?

MR. PATTISON: No, your Honor.

THE COURT: You may step down.

Thank you.

(Witness excused.)

MR. POLLOCK: Your Honor, the petitioner calls to the stand John Franzese.

(continued next page.)

J O H N F R A N Z E S E , having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

MR. PATTISON: Your Honor, at this time the Government would ask for an offer of proof as to relevancy as to the issues raised here.

THE COURT: I don't need an offer of proof. There is a question, always a question as to whether he knew about the evidence at the time of trial.

MR. PATTISON: That is what I want the evidence limited to, your Honor, of course. That is what I mean.

THE COURT: This is a hearing. I am not limiting it.

This is the defendant asking for a new trial. It's about time he took the stand. I'd like to hear his version.

Go ahead.

MR. POLLOCK: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. POLLOCK:

Q Mr. Franzese, are you commonly known as Sonny?

A Yes.

Q And how old were you when you took this nickname?

A Well, I -- I never took the name, it was given to me.

Q By whom?

A My mother.

Q Now, Mr. Franzese, in July of 1965, had you ever been in the Aqueduct Motel?

A I have never been in the Aqueduct Motor Inn.

Q In July of 1965 had you ever met Charles Zaher, who appeared today?

A I didn't.

Q Prior to February 1967, in Albany, New York, had you ever seen Charles Zaher, to your knowledge?

A Excuse me?

Q Prior to February, 1967, in Albany, New York, when he testified, had you ever seen Charles Zaher in your life, to your knowledge?

A I seen him only once. That was through the doors over one of those split windows over there in front of Mr. Judge Mishler.

Q Was that at a hearing when the witnesses were brought?

A Right. When the witnesses were brought in,

Judge Mishler excluded us from the courtroom.

Q And you were outside?

A Right. I peaked in, I wanted to see who they were, because I never saw them in my life.

MR. POLLOCK: I direct the Court to docket sheet of January 25th, such a hearing was held.

THE COURT: When?

MR. POLLOCK January 25th, 1967, the Court held a hearing of examination of witnesses.

It's only the docket sheet in the record of this case.

THE COURT: All right. Go ahead.

BY MR. POLLOCK:

Q Now, Mr. Franzese, --

THE COURT: By examination of witnesses, you mean I made the Government witnesses available to the defendant's counsel?

MR. POLLOCK: I object, your Honor.

THE COURT: All right. Go ahead.

BY MR. POLLOCK:

Q At the time you were indicted for this offense in April of 1966, who was your attorney?

A I believe it was Lester Landy.

Q Did Mr. Landy remain your attorney through the

trial of this case?

A No.

Q Did you fire him?

A Well, he brought in Mr. Sabbatino in with him. believe that's the way it sent.

Q Did Mr. Landy subsequently die?

A He died, right.

Q Did you subsequently get other counsel?

A I had Mr. Sabbatino and then Mr. Sabbatino -- I changed to Mr. Edelbaum.

Q You changed to Mr. Edelbaum when, right before the trial?

A Excuse me?

Q When did you change to Mr. Edelbaum?

A Before I went to trial.

Q The month of December refresh your recollection?

A I don't recall, no.

Q During the time you had --

THE COURT: The only lawyer I recall representing Mr. Franzese was Edelbaum.

MR. POLLOCK: Your Honor, if you look at the docket sheets, Mr. Edelbaum entered the case on Decemb er 28th, 1966.

THE COURT: Another judge had this for a while.

MR. POLLOCK: Judge Bruchhauser had it, Judge Rayfiel had it --

THE COURT: When it came before me, Mr. Edelbaum made the first appearance before me.

MR. POLLOCK: I'm not arguing that. I am simply stating there was --

THE COURT: That was before it came to me.

MR. POLLOCK: May I have this marked for identification.

THE CLERK: Document marked Petitioner's Exhibit 8 for identification.

(So marked.)

BY MR. POLLOCK:

Q Mr. Franzese, did Mr. Landy ever prepare affidavits for you to sign for different legal proceedings?

A I believe he did.

Q I show you Petitioner's Exhibit 8 for identification. I ask you to look at it and ask if that was prepared for you?

THE COURT: Is this a motion to depose Zaher?

MR. POLLOCK: Yes.

THE COURT: Give it to the Clerk. Mark it. It's part of the records of this Court.

I don't have to have the foundation for it.

I can take judicial notice of it.

THE CLERK: So marked Petitioner's Exhibit 8 in evidence.

(So marked.)

BY MR. POLLOCK:

Q Mr. Franzese, on September 9th, 1966, an affidavit was filed in which you state you believe Charles Zaher has evidence which would show that you were not guilty of the crime for which you are charged, to prove your innocence, nad you also state that you don't believe Mr. Zaher is going to be a witness against you.

A That was the information that had come down to Mr. Landy.

Q To Mr. Landy?

A Well, yes, I believe somebody had come -- had sent information down, something to the respect that -- we sent him up to Mr. Landy to talk to him.

THE COURT: Did Landy tell you this?

THE WITNESS: I believe it was something that I had read in that effect.

Q Mr. Franzese, the question is, did Mr. Landy tell you that Mr. Zaher was not going to be a witness and had information which could establish your innocence?

A That's right.

THE COURT: My question was a little different: Did Mr. Landy tell you that Zaher had some information which would be helpful?

THE WITNESS: Right.

THE COURT: He told you that?

THE WITNESS: Right, your Honor.

THE COURT: Did he tell you the information?

THE WITNESS: No, he never did, your Honor.

THE COURT: Just that Zaher had information that would help you?

THE WITNESS: That's right, your Honor.

BY MR. POLLOCK:

Q Mr. Franzese, were you able -- wasyour counsel ever able to depose Mr Zaher?

A Excuse me?

Q To your knowledge, was Mr. Zaher ever deposed or questioned by Mr. Landy?

A No.

Q Did Mr. Landy ever tell you that there was a document which could prove your innocence?

A No.

Q Did Mr. Landy tell you that Charles Zaher had testimony which could prove your innocence?

A No.

Q What did Mr. Landy tell you exactly as you can

remember it?

A He just told me to my recollection that he had soemthing and to just stay still and I will worry about it.

Q Mr. Franzese, is it fair to say that you were a nonquestioning client, you did what your attorney told you?

A Right.

I never questioned any of my lawyers.

Q When is the first time you personally met Thomas Mattio?

A I met him in Kew Gardens.

Q You say Kew Gardens, you mean the House of Detention?

A That's the House of Detention.

Q Where in the House of Detention?

A I believe it was in church.

Q Do you remember how the meeting came about?

A Yeah.

We were sitting down, I went to church and I found a young man in front of me sitting there, so I was speaking to a few people near me, around me, I wonder who this guy is, so he must have heard me and he turned around and said,"somebody better introduce us, because I'm your co-defendant, my name is Tom Mattio."

Q The first time you ever met him?

A The first time I ever seen him or ever spoke to him.

Q Mr. Franzese, did you conspire to rob banks with John Cordero?

A Never did.

Q Did you conspire to rob banks with Richard Parks?

A NEver did.

Q Did you conspire to rob banks with James Smith?

A Never did.

Q Did you conspire to rob banks with Charles Zaher?

A Never did.

Q Mr. Franzese, you made a comment to me, I'd like you to tell the Court regarding what you told your children about this case.

THE COURT: Objection sustained.

MR.PATTISON: I object.

MR. POLLOCK: I believe the credibility of this witness is important.

THE COURT: Objection sustained.

Q Did you ever provide diagrams for banks to be stolen, to be robbed in Salt Lake City to the four persons

just named?

A Impossible. I was never in Salt Lake City in my life.

MR. POLLOCK: I have no further questions.

THE COURT: Do you mind if I ask one?

Why didn't you get up in the trial and say so?

THE WITNESS: I left that to my lawyer.

He advised me not to take the stand.

THE COURT: You never said to him, I want to get up and tell my story.

THE WITNESS: He told me not to testify, that's right, your Honor.

THE COURT: Mr. Pattison.

CROSS-EXAMINATION

BY MR. PATTISON:

Q Sir, you were here today in court when Thomas Mattio said that he sent you news, a message; is that right?

A That's what he said, right.

Q Do you remember that, through a man by the name of Castalazo?

A I wouldn't know.

THE COURT: Benji.

Q Castalazo, Benji Castalazo.

Do you know him personally?

A I've heard of the name.

Q Have you ever met him?

A Not -- did I ever talk to him in reference to any messages?

Q No. Ever, did you ever talk with Benji Castalazo?

A YEs, I did.

Q So he knows you?

A Right.

Q And you know him?

A Yes, I did.

Q During the spring or summer of 1966 did Benji Castalazo ever mention Thomas Mattio's meeting?

A I doubt it very much.

Q You aren't sure?

A I don't recall it. I doubt it. I would have remembered it.

THE COURT: What is your best recollection, that he did or that he didn't?

THE WITNESS: He didn't.

Q During the course of this hearing have you made efforts to try and locate this Benji, Benji Castalazo?

A I just heard his name now, Mr. Pattison.

Up until Mattio said his name, I didn't realize

he existed in this case.

Q Didn't your lawyer interview Mattio months ago?

A Yes, he did.

Q Did you ask him whether he ever said that name?

A He never mentioned that name to me.

Q Who he told?

A Excuse me.

Q Did you ever ask your lawyer to ask Mattio who is he supposed to have told?

A I told him to check. He was supposed to do that himself.

Q Did you ever ask him whether he ever did?

A No, I never did. Because I couldn't remember who this message was, that's why it never dawned on me.

Q Did you actually get a message?

A Excuse me?

Q Did you actually get a message?

A No, sir.

I don't remember the message at all.

Q Did Zaher, Charles Zaher, prior to the 1967 trial?

A No, sir.

Q Didn't you just say that your lawyer --

A Excuse me.

Q You just said that your then lawyer --

A No, I didn't say that.

Q -- Mr. Landy mentioned something to you about Zaher?

A He mentioned that he had information, but I don't know who it was from. I never questioned him.

Q Did he mention anything about Charles Zaher?

A No, he didn't.

(continued next page.)

Syl flws.

CROSS-EXAMINATION

BY MR. PATTISON: (Cont'd.)

Q Did he say anything about Thomas Mattio?

A He didn't.

MR. PATTISON: May I have that exhibit that you just had, the motion. (Addressing Mr. Pollack)

Q You signed this, didn't you, this affidavit? Not necessarily this one, but --

THE COURT: That is a copy. Will you concede that the defendant signed that affidavit?

MR. POLLACK: Certainly, your Honor.

Q So, at least at that time, September 30th, 1966, -- pardon me, the 9th day of that month, 1966, you were of the firm belief that Charles Zaher had important information?

A No, I didn't. I didn't know who had the information.

Q Did you read this before you signed it?

A Excuse me. Is that that same one I read before?

Q Yes.

Q My lawyer knew that. I signed it, that's right.

Q Did you ask your lawyer, "What am I --"

A No, I didn't.

Q "What am I signing?

A I just signed the paper because he's my lawyer. I left it up to his judgment.

Q So then at least you are saying Mr. Landy knew --

A I didn't say that.

Q -- that Zaher was --

A I'm sorry. Go ahead.

Q If you didn't know the importance of Zaher, and your lawyer asked you to sign a paper saying it is important that we get Zaher and find Zaher, wouldn't you assume that your lawyer had a reason for that?

A He had a reason, no question about it.

Q When did Mr. Edelman take over the case, do you recall approximately when?

A No, I don't. I don't recall that.

Q Mr. Landy died when, sir?

A I wouldn't recall.

Q Was it recent?

A No, he died during the trial. While the -- I mean he died just before the trial. I believe he died just as Mr. Sabbatino took his defense as my lawyer.

Q That was his own partner, is that right?

Sabbatino was with the law firm?

A No, there was two individuals, two different law firms.

Q Mr. Sabbatino and Mr. Landy were not associated in any way?

A No, they weren't.

THE COURT: Sabbatino and Tortarelli, that was the partner. Mr. Boitel is sitting in the courtroom. He is a former associate of Mr. Sabbatino. He was employed at the firm or as an associate.

Am I correct, Mr. Boitel?

MR. BOITEL: That's correct, your Honor.

THE COURT: Mr. Boitel, Mr. Landy was never associated with the firm, was he?

MR. BOITEL: No, sir, he was not. He brought Mr. Sabbatino into the case.

THE COURT: I see.

Did he have offices in your suite or was he on the same floor in the same building?

MR. BOITEL: I know he didn't have offices in our building. I don't know where his office was located.

BY MR. PATTISON:

Q Did you ever tell anyone that you did get a

message from Mattio, Thomas Mattio?

A No.

Q Did you ever tell your own lawyer?

A No.

Q That you did get a message?

A No.

THE COURT: Your own lawyer. You are pointing to Mr. Pollack, is that who you mean?

MR. PATTISON: Yes.

A No, sir.

Q No, never said that?

A No.

Q And you never said that you got this message but you couldn't recollect who it was from, that there was some mixup as to who was the source of the message?

A Don't recall message at all.

Q Never said that?

THE COURT: Did Parks, Cordero or Smith ever come to you and ask you for money to hire lawyers?

THE WITNESS: Your Honor, I never saw them in my life.

THE COURT: They never made that demand on you?

THE WITNESS: I never seen them until I was

indicted with this crime.

THE COURT: No third parties ever came to you and said that?

THE WITNESS: No, your Honor.

THE COURT: "You better pay the fees here."

THE WITNESS: No, sir.

BY MR. PATTISON:

Q When for the first time did you ever hear of their names, do you have any recollection?

A The first time I heard their name is when I was being indicted for this crime, I got indicted for this crime.

Q That would be in April of --

A Around that period sometime. I don't recall. I never had no reason to know who they were. They were never friends of mine.

Q When for the first time did you meet Mattio, Thomas Mattio.

A I met him in the Kew Gardens Prison there, whatever you call it, Mr. Pattison.

Q That was out in Queens?

A Queens County.

Q Prior to the murder trial?

A Right.

MR. PATTISON: May I have a moment, your Honor?

THE COURT: Surely.

(Pause)

BY MR. PATTISON:

Q Cordero's wife, when did you first meet her? Do you know her?

A Never seen her in my life.

Q Elinor?

A If she was in this courtroom now, I wouldn't know her. Never seen her.

Q Did you ever hear of her?

A Excuse me?

Q When for the first time did you ever hear of her?

A Again we go back to the same question. This case here.

Q Prior to that had you ever heard of her?

A Never heard of her, no, sir.

Q Rupolo, I think her name was back in 1964, 1965.

A Wouldn't know her or him.

Q Did you know her under that name?

A Never knew her or never knew him.

Q Would it be fair to say that you have -- that you, during the trial of this matter, trial of the case, never talked with your own lawyers about witnesses, potential witnesses, matters which you feel might be helpful to them, did they ever sit down with you and talk to you --

A No, as a matter of fact Mr. Edelbaum told me, when we went to trial, he said to me, "If this is all you got to tell me which is nothing, we are going to trial with the yellow pad and a pencil," he showed me. "This is how we are going to trial," and I believe he threw them in the valise, and that's how we went to trial. I had nothing to tell him because I knew none of these defendants.

Q Did you throw him a copy of this motion, sir --

A Excuse me?

Q Did he throw into that bag also a copy of the motion asking to meet with and talk with Zaher?

A I never discussed the motion with Mr. Edelbaum. I didn't realize it was there and I never knew it was withdrawn.

Q Mr. Edelbaum is a relatively thorough lawyer, isn't he, wouldn't you have to say?

A Excuse me?

Q From your knowledge of lawyers, wouldn't you say that Mr. Edelbaum was a relatively thorough lawyer?

THE COURT: I don't know that this witness is an expert on the effectiveness of lawyers.

MR. PATTISON: Not the effectiveness, your Honor, thoroughness.

THE COURT: Same thing.

DS fls.

(Continued on next page.)

js:jk
end

Q But it was a matter of record, was it not?

A Excuse me. What was a matter of record?

Q That the motion was filed and signed --

A It was filed, I did, right, but I don't remember it ever being withdrawn.

MR. PATTISON: I don't have any further questions.

MR. POLLACK: No redirect, your Honor.

THE COURT: You may step down.

(Witness excused)

THE COURT: Next witness.

MR. POLLACK: At this time I would ask the Court to take judicial notice of the docket sheet of this case pursuant to an entry for December 28, 1966, a stipulation for the substitution of attorneys, filed for the defendant Franzese, Maurice Edelbaum, 233 Broadway, New York City.

THE COURT: I got the case after that date.

MR. POLLACK: No, I think you were the judge -- no, Judge Rosling handled the next thing also. Correct. There was a couple of mentions of you in here, Judge, on 11/28. But you referred it to Judge Rosling. That is the time we didn't have an individual assignment system in the court.

MR. PATTISON: Your Honor, I think that the records and files of the case are part of the motion.

THE COURT: I will take judicial notice of all the records in the matter.

MR. POLLACK: Your Honor, there are certain points in the record I would like to bring up.

THE COURT: You can bring them up in your trial brief.

MR. POLLACK: At this point, your Honor, the petitioner will rest.

THE COURT: Mr. Pattison?

MR. PATTISON: We have no further case, your Honor. We will rest.

THE COURT: All right.

MR. PATTISON: Your Honor, I would like to order the minutes and submit a brief.

THE COURT: I will await the answer on the polygraph.

MR. PATTISON: That should be forthcoming Monday, your Honor, I would say at the latest. We would like maybe two weeks to submit a brief.

THE COURT: Well, if you agree to the polygraph you can have more time than that because I won't decide this case until after the polygraph.

MR. POLLACK: Your Honor, I can have a brief in quicker, and if they are not going to agree to the polygraph I would ask the Court to expedite the matter. I believe there is a substantial question here. And I believe that the Petitioner --

THE COURT: You oppose the polygraph?

MR. POLLACK: No. I say if they are not going to agree with it.

THE COURT: Oh, I see.

MR. POLLACK: Then I would ask the Court to make it less time than two weeks.

THE COURT: How much time do you want?

MR. POLLACK: I can have a brief in by Thursday of next week.

THE COURT: Don't you want to wait for the transcript?

MR. POLLACK: I don't believe for me it is necessary, your Honor. But I will order it on a daily copy if t hat will expedite the matter.

THE COURT: Well, the Government --

MR. PATTISON: So will we, your Honor.

THE COURT: Get your briefs in as soon as you can.

MR. PATTISON: Yes, I shall.

THE COURT: The time for submitting briefs will

be irrelevant if the Government consents to the polygraph.

MR. PATTISON: Yes, it will.

THE COURT: If it does not, then we will talk about how long it should take.

MR. PATTISON: Very well, your

MR. POLLACK: Does the Court [illegible] bits, your Honor?

THE COURT: Well, don't you want them for your brief first? Submit them with your brief.

MR. POLLACK: Very fine.

Your Honor, will the Petitioner be kept here on the writ until the decision is reached?

THE COURT: No.

MR. POLLACK: I would request that it be done.

THE COURT: There is no reason for it.

MR. POLLACK: I believe there is a substantial question. I want to confer with him during the time of my brief.

THE COURT: Mr. Pollack, I think there is a substantial question. And I will start quoting the cases which in effect say verdicts and convictions are not easily overturned.

MR. POLLACK: I agree with that.

Franzese

THE COURT: And you have the burden of proof.

MR. POLLACK: I think we have met it.

THE COURT: When you say there is no substantial question I interpret that a different way than you would like me to interpret it.

MR. POLLACK: No. I say there is a substantial question for the Court to determine.

THE COURT: Oh, there is a substantial question you say.

MR. POLLACK: And I believe I would request of this Court at least one week with my client. I have had two days with him now. And some of the misconceptions and misconstructions of statements that I have made because I haven't had time to talk to him --

THE COURT: Do you rest?

MR. POLLACK: Yes.

THE COURT: Do you want him to prepare your case further?

MR. POLLACK: I would like to have him here further.

THE COURT: Do you want some time to prepare your case further?

MR. POLLACK: Yes, I would like to speak to him, your Honor.

THE COURT: All right, speak with him here over the weekend. And you, Mr. Pollack, start talking with him now. And if you want to re-open these proceedings you submit an affidavit immediately and tell me why.

MR. POLLACK: Okay.

THE COURT: But he will not be kept here because you think that there is a substantial question.

I told you this, Mr. Pollack, and I mean this very sincerely. Mr. Franzese will be treated with the same courtesy as every other prisoner is treated. No better. I intend to decide this case as though it was United States v. Mr. X, some unknown individual.

MR. POLLACK: That is all we ask.

THE COURT: He will get a new trial if I think he deserves it. I will deny it if I think he doesn't deserve it. And I want to make that point very clear.

MR. POLLACK: But, your Honor, it doesn't go to the issue. If the Court does decide there is to be a new trial and the Court does grant him and does rule within a two- or three-week period, the defendant should be here.

THE COURT: Mr. Franzese will be here if it is convenient to the Marshal's service to keep him here over Monday. But he will be here until Monday at least. If you say that you haven't had enough time to

talk to your client, you start talking with him, because I have listened to arguments like that from you since you came into the case. And I am getting to disbelieve your statements.

MR. POLLACK: Your Honor, I wrote this Court a letter when the case was on for oral argument asking that the defendant be brought in for me to confer with him. And one of the main reasons I stated that in the letter was the content of the letter produced by Ann Zaher. I did not get a chance at that point. The Court wrote back and said if it is only oral argument I am not going to release the defendant --

THE COURT: First you indicated to me that Mr. Franzese would not be a witness because he had no information to give. That is what you indicated to me. Then you want him in here a week before to go over the case.

MR. POLLACK: When the letter became relevant, your Honor, yes, it became important to have Mr. Franzese here.

THE COURT: I tell you, Mr. Pollack, to be very careful of the representations you make to this Court.

MR. POLLACK: Your Honor, I take that at great personal umbrage. I wrote this Court a letter. There were misstatements that Mr. Pattison used of mine in

the hearing that was heard in chambers regarding the letter --

THE COURT: All right, we are going to cut this short. I won't hear any further argument. All I am saying to you is do not ask that Mr. Franzese remain here for a week because there is a substantial question. That is a phony argument.

MR. POLLACK: I don't believe it is, your Honor.

THE COURT: All right. I am telling you it is.

Now, this has nothing to do with the merits of the case, believe me.

MR. POLLACK: I believe he should stay here until there is a decision.

THE COURT: No, he will not. He will not because no other prisoner is treated this way. That is the point I am making to you.

MR. POLLACK: Your Honor, my experience is just the opposite. I believe prisoners are kept here for long periods of time for any decisions on motions.

THE COURT: Really?

MR. POLLACK: Yes.

THE COURT: Before me?

MR. POLLACK: I have never had a motion before you.

MR. PATTISON: Post-trial motions?

MR. POLLACK: Yes.

My experience in the Government was certainly to that effect, yes. Prisoners were kept until they got a decision --

THE COURT: Well, you point out a case to me of mine where I kept the defendant here on a 2255 until I rendered a decision. Find one.

MR. POLLACK: Your Honor, I am not challenging the Court.

THE COURT: But I say I think it is important to you. I think it is important to Mr. Franzese. I think it is important to the family to know that he is not being treated any better or any worse, because they might get the impression he is going to be treated worse because he is Franzese. And what I am trying to tell them through you is that he is not going to be treated any worse. But on the other hand, I want you to know teat he is not going to be treated any better.

MR. POLLACK: I am not asking for that.

THE COURT: And do you want to know something? That is the way he knows he is not going to be treated any worse, because I am telling you he is going to be treated no better. Now that is a lesson maybe you ought to learn.

Gentlemen, good day.

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Thomas Mattio	4	28	37	
Hanna Sulner	44			
Charles Zaher, Jr.	53	101		
Victor Kaufman	182			
John Franzese	192	201		

E X H I B I T S

PETITIONER'S	DESCRIPTION	FOR ID.	IN EV.
1	Three-page document	4	
2	Six-page copy of document 64-CR-460	8	9
3	Document	18	38
4	Document	26	28
5	Document		51
6	Letter	91	152
7	Postcard	185	187
8	Document	196	197
RESPONDENT'S			
A	FBI Report	114	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN FRANZESE,	:	
Petitioner,	:	Index No.
-against-	:	75 C 1613
UNITED STATES OF AMERICA,	:	
Respondent.	:	

MEMORANDUM OF LAW

The Petitioner, John Franzese, addresses this Court pursuant to 28 U.S.C. §2255 for a writ of habeas corpus granting him a new trial. In support of this motion the Petitioner will rely upon this Memorandum of Law, the facts adduced at the evidentiary hearing on December 12, 1975 and on the prior Memorandum of Law submitted in behalf of the Petitioner.

It is the Petitioner's position that the factual discoveries at the evidentary hearing, so overwhelmingly and uncontrovertedly prove his conviction to be the product of perjurious testimony that had the trial jury been apprised of this perjury it would have had no choice but to alter its

verdict and acquit the Petitioner of the crime as charged. See United States of America v. Stofsky, et al, Slip opinion dated November 7, 1975, Second Circuit Court of Appeals ____ Fed. 2d _____.

Facts Adduced at the Evidentiary Hearing

The Petitioner wasconvicted in March 1967 based upon the testimony of four self-confessed bank robbers. There was no outside corroboration of Petitioner's involvement in the bank robbery scheme presented to the jury except for the testimony of Richard Parks, John Codero, James Smith and Charles Zaher. These four men depicted the Petitioner as the mastermind of a nationwide bank robbery ring, of which they were the operational hands. The Petitioner's motion for a new trial is based largely upon the recantation of the testimony of the witness Zaher and corroborative witnesses and documents.

The key to the Petitioner's involvement in the bank robbery ring lay in a meeting which allegedly occurred at the Aqueduct Motor Inn in Queens, New York between July 19 and 23 of 1965. Prior to this meeting the four witnesses had robbed two banks under, as they testified, the leadership of one Anthony Polisi. The purpose of this meeting was to

change that leadership because of the dissatisfaction with the Polisi leadership. Zaher testified at the trial that one of the reasons Franzese was brought into the operation was because he (Zaher) "was having a hard time stealing cars." (T.Tr. 1459) Not only did Zaher testify at the evidentiary hearing that said meeting never took place, Petitioner further introduced overwhelming evidence of the fact that Charles Zaher had the ability to steal any car made by General Motors through the year 1965. This ability was brought about by the fact that through his friend and crime companion, Thomas Mattio, Zaher had come into possession of a full set of repossessor's keys. See H. Tr. pp.40, 41, 42, 57, 68, 83 and 84.

In 1965 Richard Parks, Charles Zaher and Thomas Mattio were all young would-be racketeers who palled around together. Mattio and Parks had been indicted together in 1964 for a theft from an interstate shipment. See Petitioner's Exhibit 2. At the hearing, both Mattio and Zaher testified that Zaher was also a party to that hijacking (H. Tr. pp. 7, 74) and Zaher further testified that he was not identified until the prosecution began to prepare the case for trial and that when identified he was told that he would not be indicted because of cooperation he was giving in the Franzese

case. (H. Tr. p. 75). It must be noted parenthetically that Zaher's participation in this crime and the reason he was not indicted was never made known to the court or jury at Petitioner's trial.

During the spring of 1966 the witness Charles Zaher was incarcerated in the federal prison at Danbury, Connecticut. During this period of time Zaher smuggled out at least two letters to his boyhood friend, Thomas Mattio, through his wife, Ann Zaher. Zaher testified that the import of these letters was to inform Mattio that the testimony coming forth from Zaher and his three witnesses was not the truth and that they had in fact already perpetrated a "frame against this guy Tony" who Zaher testified at the hearing to be Anthony Polisi and that he, Zaher, had to go along with the guys (meaning Parks, Smith, Cordero) to frame this guy Sonny, too. Zaher then goes on to lament his involvement in the bank robberies because he earned more money robbing cars with Mattio than he did holding up banks with the other three. This corresponds with Mattio's testimony that he was asked to join in the bank robberies at their inception and again after Zaher's departure from the conspiracy and each time he rejected the offer because of his dislike and distrust of one of the participants, namely,

Cordero (H. Tr. 10, 12 and 13).

The Petitioner's motion is an attempt to bring forth the truth in this muddled matter once and for all. It has been Petitioner's contention from the beginning that he did not know of any of these four witnesses. Note page 5 of the T. Tr. dated January 31, 1967 a statement by his attorney, Mr. Edelbaum:

> "As a matter of fact, your Honor, there is the contention of my client, most, sincerely, that he does not know any of these government witnesses."

In an effort to uncover these truths we have gone to all ends necessary to secure admissible testimony and documents for this Court's consideration. Our efforts have been sincere and in good faith but it appears from their action that the Government's interest is not in the ascertainment of the truth but rather in the maintaining of the conviction.

On December 12, 1975 the Honorable Court heard Mrs. Hannah Sulner, a distinguished disputed documents expert, testify regarding the authenticity of Petitioner's Exhibit 3. That exhibit was tested and found by Mrs. Sulner to be between 5 and 10 years of age, probably closer to the 10-year mark. (H. Tr. p. 47). Mrs. Sulner showed the Court how she reached her determination and the Court, by using a magnifying glass, was able to see how Mrs. Sulner reached

this result (H. Tr. 52). This test was conducted successfully after a supplemental memorandum of law was submitted by the Government in which they refused to examine the documents because "after consultation with various experts as to what may be learned from scientific analysis the Government is of the view that such an exercise would be futile due to the common nature of the paper and the ink." (Supplemental Memorandum, pp. 2 and 3). One can only wonder if these are the same experts, referred to in the Government's letter of December 15, 1975 to the Court, who now find the polygraph examination to be unreliable, despite the elaborate precautions and extensive conditions the Court proposed be placed upon the examinations.

Petitioner's Exhibit 6 is a letter written on June 15, 1966 from Charles Zaher to his wife. That letter makes reference to the recent conviction of Thomas Mattio. Petitioner points the Court to Exhibit 2 which shows Mattio was convicted of a hijacking on June 13, 1966 before the Honorable John Dooling for the Eastern District of New York. In that letter Zaher makes mention of Petitioner's Exhibit 3 and also indicates the co-witness Richard Parks was aware of that letter and Mattio's response to same. The letter continues in another vein which is highly probative of the

motivation of Charles Zaher in coming forward to recant his testimony in 1975. Zaher speaks of Mattio getting a taste of jail so that he won't always "be standing on that street corner talking slick. I little time in jail would straighten him out." Obviously on June 15, 1966 Charles Zaher had reached the conclusion in his own mind that crime was not to be his future life course and in his own way wished to teach the same lesson to his dear friend, Thomas Mattio. This sounds a bit sanctimonious coming from a person like Charles Zaher but the Court must look at the historical development of the facts. In 1965, Charles Zaher was a petty thief, bank robber and drug addict. Subsequent to his release from jail he has, in fact, never been back in jail and had but one or two small incidents with the law in 1968 or 1969 (H.Tr. 94). Since 1969 he has been steadily employed by the same concern and free of drugs (H.Tr.95). The letter, Petitioner's Exhibit 6, written by Zaher was obviously a sincere pronouncement of his desire to lead a law-abiding life.

In February 1967 at the trial of the Petitioner, Charles Zaher testified he left New York City on July 29, 1965 and returned on or about Augut 8, 1965. See T.Tr. p. 1496. Zaher testified he took his family upstate to

visit several of the children's amusement areas, such as Santa's Workshop and The North Pole. At the hearing Ann Zaher, the wife of Charles Zaher produced a postcard, Petitioner's Exhibit 7, dated July 31, 1965, from North Pole, New York. Mrs. Zaher testified that she and her family were away for approximately two weeks, that the farthest point they went to was North Pole and they made all their stops on the way up to North Pole (H. Tr. 184). She further testified it took approximately eight days to reach North Pole (H. Tr.185). Mrs. Zaher testified that she knows she was away on July 26 because that was her sister's birthday and she was not home for it (H. Tr. 188). Mrs. Zaher also testified that she was under doctor's treatment on July 13, 14 and 17 of 1965 and that her condition was cleared up on July 17 and she left with her family and husband on this trip within four days of her last doctor's visit (H. Tr. 188). This would indicate that the Zaher's left New York on or about July 21, 1965 right in the time period for the alleged meeting. This only further corroborates and explicates Charles Zaher's testimony that he was never present at such a meeting.

During the course of his testimony Zaher states that the name John Franzese was first mentioned to the four

witnesses by a member of law enforcement, S. A. Thatcher, and that John Cordero immediately picked up on the idea of implicating Franzese in a crime to gain leniency for himself. (H. Tr. 63,64). Cordero's leadership in the effort to justify another Federal prosecution is easily understandable in his stated concern that he would not receive the same consideration on sentencing as the others because he did not testify at the Polisi trial (T.Tr. 536). And Zaher's testimony that the name Franzese was first mentioned by a member of the prosecution team is substantiated by the trial testimony of James Smith who remembers A.U,S.A. Michael Gillen first mentioning Franzese (T.Tr. 537). Thus it becomes obvious that the name Franzese was first mentioned to these men by members of law enforcement in the form of an investigative inquiry and then the four witnesses sold law enforcement a story concerning their involvement with John Franzese. Thus from the chance mentioning of a name four desparate men seized upon a story aimed at winning their freedom.

The last witness called by the Petitioner in this hearing was John Franzese himself. Mr. Franzese testified that he never knew any of these men who testified against him in the year 1965. When asked by the Court why he did not testify in his own behalf, Mr. Franzese answered: "I

left that to my lawyer. He advised me not to take the stand." "The Court: You never said to him I want to get up and tell my story?" "The Witness: He told me not to testify. That's right, Your Honor." (H.Tr.201). Mr. Franzese was represented by the reknown trial counsel, Mr. Maurice Edelbaum. Mr. Edelbaum entered the case but one month prior to trial on December 28, 1966. However, having done an independent survey of Mr. Edelbaum's work, one can almost universally accept the proposition that no defendant represented by Mr. Edelbaum will ever take the stand. For whatever reason, that seems to be Mr. Edelbaum's preference. Mr. Franzese was a client who trusted his fate into the hands of the lawyer he retained. He could have had no way of knowing that the rigidity with which counsel tries each case would come back to haunt him, and be relied upon by the Government's witnesses (H. Tr. 69). This is the same counsel who spent little or no time with a repentant Charles Zaher in late 1969 or 1969 (H. Tr. 100,101).

CONCLUSION

The Second Circuit has recently enunciated its present day guidelines to determine whether or not a new trial should be granted, based upon perjurious testimony. In Stofsky, supra, the Court applied the rule of Berry v. Georgia, 1060, 511, 527 (1851) stating that "new evidence will not entitle defendant to a new trial unless it probably would produce a different verdict." (emphasis supplied). The Court further answered in the affirmative the following question: "Should we in determining whether truthful testimony by the witness would probably have changed the jury's verdict also assume that the jury would have known that he had lied under oath about the matter."

In the case of United States v. Franzese, the entire Government's case rested upon the credibility of the four above-mentioned witnesses. Based upon this testimony the jury deliberated for approximately 38 hours before reaching its verdict. If the jury had before it the recantation of Charles Zaher supported by long suppressed letters which state that Franzese is the subject of a frame [a commonly understood euphemism indicating that an innocent

person is to be falsely charged with a crime by another] and, in addition, the testimony showing that Zaher lied about the dates he was out of town, and, had the jury known of the testimony of Thomas Mattio, indicating his conversations with Zaher and Parks, concerning the bank robberies and efforts to enlist his aid in same, would they have convicted?

Stofsky now allows this Court to weigh the newly discovered evidence and the effects that evidence and a recantation may have had upon the factual elements of the Government's case and upon the credibility of the Government's witnesses. Stofsky, supra, 531.

It is respectfully submitted that the quality and quantity of proof presented by the Government in his case, when confronted by documents and testimony screaming the innocence of the defendant Franzese, do not support a verdict of guilt and that Petitioner's Exhibit 3 alone makes the recantation of Zaher more strongly corroborated than the entire stream of testimony the Government presented at trial. That Exhibit 3 combined with Exhibit 6, which indicates a knowledge of the existence of that letter by co-defendant Richard Parks, taken in conjunction with the statements by Parks to Mattio, do fairly certainly assure that upon retrial

a jury would see through the gossamer wings upon which the Government attempted to fly its case and render, therefore, a verdict of acquittal.

The case is a sham and a miscarriage of justice. It is taking the Petitioner to uncover that sham and relieve all parties of the burden of this conviction. The Government, a party unready and unwilling to ascertain the truth has, at every opportunity refused to come in search for the facts. This Honorable Court implored the Government upon more than one occasion to join it and defendant in such a search. The Prosecutor's only reply was that unnamed and unknown experts advised them against these undertakings.

Justice now demands that a new trial be granted and that a jury of the Petitioner's peers now be given the right and duty to decide this case upon all the evidence.

Respectfully submitted,

MICHAEL B. POLLACK
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PETITIONER'S LETTER IN ANSWER TO GOVERNMENTS MEMORANDUM OF LAW DATED DECEMBER 30, 1975

MICHAEL B. POLLACK
Attorney at Law
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NEW YORK, NEW YORK 10019
TELEPHONE (212) 247-3720

December 30, 1975

The Honorable Jacob Mishler
Chief Judge, United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: John Franzese 75 C 1613

Dear Judge Mishler:

I am writing to you immediately upon receipt of the government's memorandum of law to clarify what I consider to be a prejudicial misstatement contained in said memorandum.

On page five of their brief, the government states, "Further and devastating corroboration of the original trial testimony is supplied by Mr. Helfand, when he testified that, in the middle of October of 1965, Cordero told him that 'Sonny' Franzese was implicated in the robberies (T. 2812, 2813)." It is an accurate statement as far as it goes. On page 2813, the prosecutor reminds Mr. Helfand that in October of 1965, the witness Cordero was represented by Mr. Ruby DiBlasi for some period of time. This is confirmed by the Criminal Docket Sheet for 65 CR 443. The witness then concedes he does not know how long this relationship lasted and based on that answer, the Court sustained an objection. A review on Criminal Docket 67 CR 17, the number assigned the case upon its transfer to Albany, shows a notice of appearance was filed by Helfand and Lesser for the defendant John Joseph Cordero--dated April 29, 1966. Such notice thus was six months after Cordero's arrest and two weeks subsequent to the indictment of the petitioner. These facts are hardly devastating corroboration for the original trial testimony as claimed by the government.

Yours, etc.,

Michael B. Pollack
Attorney for John Franzese

MBP:me
cc: Assistant U.S. Attorney,
Thomas Pattison, Esq.

DISTRICT COURT DECISION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -

75 C 1613

JOHN FRANZESE,

Petitioner,

-against-

Memorandum of Decision and Order

UNITED STATES OF AMERICA,

Respondent.

January 21, 1976

- - - - - - - - - - - - - - - - - - -

MISHLER, CH. J.

Petitioner moves, pursuant to 28 U.S.C. §2255, to vacate the judgment of conviction and for a new trial, based on the recantation of government witness Charles E. Zaher.

Petitioner's trial was held in Albany, New York in February, 1967. Zaher appeared as a witness on February 13, 1967. He testified that he first met the petitioner, John Franzese, in November 1964, at the Crystal Room, which was located at Crescent and Fulton Streets, in Brooklyn, New York. The only testimony that Zaher gave which linked Franzese to the bank robbery conspiracy of which h was ultimately convicted was about a meeting in July, 1965.[1] Zaher testified that he entered the bar of the Aqueduct Motor Inn with Cordero about 9:00 P. M. on July 21st. There they met Parks, Smith and Polisi.

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[1] The accomplices testified that the meeting was held either on July 19, 20, 21, or 22. It will hereafter be referred to as the July 21, 1965 meeting.

BEST COPY AVAILABLE

Polisi first told Cordero to go to a room on the second floor; then Crabbe came to the bar and told Zaher to accompany him to the second floor (T. pp. 1456-1457).[2] Present were Franzese, Matera, Crabbe, Florio, Cordero and Zaher (Potere was not present). Zaher described the meeting as follows:

> Well, Mr. Cordero was speaking to Mr. Franzese at the time when he told him we were pretty disgusted with the last two robberies that Mr. Polisi had sent us out, the first bank robbery we were supposed to get $50,000 in cash, instead we got bonds . . . .
>
> . . .
>
> . . . I told Mr. Franzese that I was having a hard time stealing cars, and Mr. Franzese said, "Okay, from now on I will take care of these banks personally from the bank right on down to the stealing of cars."
>
> And he said, "As Tony told you, if anybody gets arrested I will make sure they are bailed out and they'll have a lawyer, and if you get sent away . . .
>
> . . .
>
> I will make sure that your family gets money every month."
>
> Then he says, "From now on if you want to reach me you contact me through anybody in the room, and whatever they tell you to do you do it because the order is coming from me."

(T. pp. 1458-1459).

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[2] In this memorandum, trial testimony references will be preceded by "T."; the hearing testimony references will be preceded by "H."

Zaher testified that Franzese said that if Zaher wanted to contact him, he should first see Crabbe, Florio, Matera or Polisi, and that he never again saw Franzese until he made an in-court identification of Franzese.

Zaher's affidavit recanting his trial testimony states that he never saw Franzese prior to the in-court identification and did not attend a meeting at the Aqueduct Motor Inn in July, 1965.[3] He says that during the preparation for trial of United States v. Polisi,[4] Special Agent Thatcher asked the accomplices whether they knew "Sonny" Franzese; that Thatcher told him of F.B.I. Director J. Edgar Hoover's intense interest in Franzese. Faced with a possible life sentence Zaher says, he

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[3] Zaher also points to other testimony that he says is false that does not directly link Franzese to the conspiracy, i.e., the reason he withdrew from the conspiracy after the bank robbery of July 13, 1965, and the nature of the obligation due Parks from Polisi, and the fear that Polisi had ordered that Zaher be done in.

[4] Anthony Polisi and his son Salvatore, together with Cordero, Smith, Parks and Zaher, were charged with armed bank robbery of the Central Queens Savings and Loan Association on July 7, 1965, and of the Queens County Federal Savings and Loan Association on July 30, 1965. The trial was held in January, 1966. Cordero, Smith, Parks and Zaher pleaded guilty. (Zaher pleaded guilty to only the July 7, 1965 robbery.) Smith, Parks and Zaher testified that Polisi was the mastermind. After the conviction of Franzese, et al., was affirmed, 392 F.2d 954 (2d Cir. 1968), the Polisis moved for a new trial pursuant to Rule 33, F.R. Crim. P., based on the testimony of the accomplices at the Franzese trial which relegated Anthony Polisi to a minor role and showed Franzese as the ring leader. The Court of Appeals reversed the district court's denial of a new trial as to Anthony Polisi, based on the government's suppression of Cordero's statement of September 30, 1965, and his Grand Jury testimony of October 7, 1965 (Cordero did not testify at the Polisi trial) indicating that Anthony Polisi's role after mid-July, 1965, was a minor one, i.e., storing weapons and providing a meeting place, 415 F.2d 573 (2d Cir. 1969).

submitted to the pressure of his accomplices to fabricate testimony implicating Franzese. /5

The affidavits supporting Franzese's motion offer a letter smuggled out of the Federal Correctional Institution at Danbury, Connecticut, by Zaher's wife, written by Zaher (then an inmate at the institution) and directed to Thomas Matteo in May or June of 1966. The letter states in pertinent part:

never claimed to from Matteo

> . . . Richie is going to testify against you and they want me to. You see how we framed this guy Tony, and I have to go along with the guys to frame this guy Sonny to For these . . . Bank robberies . . . . Tom they really have me squeezed in I try to bug out but I didn't make it. I don't mind testifying against guys I don't know but you are a different story. /6

/5 The birth of the idea is vividly described by Zaher in his affidavit at 4-5:

> Later that night when we were returned to West Street, Cordero got very excited, "Did you hear what Thatcher said, 'Hoover would give his left nut for Sonny?' We could get a suspended sentence if we could get something on Franzese." Smith and Parks responded, "You're crazy, you'll get us all killed if we put Sonny on something." I said, "What can we put him on?" First Cordero suggested involving Sonny Franzese in a coin robbery they were involved in on Long Island. This was rejected because I hadn't taken part in the robbery and my lack of knowledge was dangerous should I be questioned closely about it. We next discussed and rejected an idea to implicate Sonny in an armored car robbery in Yonkers, but rejected this because we didn't know the intimate details of this situation. The information was being given to John Cordero by another inmate about a score he had planned but never made. It was finally decided to implcate Sonny Franzese in a situation we knew about, the bank robberies.

/6 Matteo interpreted this letter as a notice that Parks, Cordero and Smith demanded that Matteo join them in their conspiracy to falsely accuse Franzese. Matteo's affidavit states that he refused to join such a diabolical scheme. Within six months of the receipt of the letter a Queens County Grand Jury indicted Matteo and Franzese for the murder of Ernie Rupolo. The murder trial resulted in an acquittal of both Matteo and Franzese.

The affidavits state that Mrs. Zaher showed Matteo the letter and Matteo asked a mutual friend, Benji Castaldzo, to advise Franzese of the contents; they show that during the trial in the murder indictment, William Kleinman, attorney for Matteo, was aware of the existence of the letter.[7]

Dec. 1967 ftn + rest

The court held an evidentiary hearing.[8] Charles Zaher, his wife, Ann Zaher, and Thomas Matteo testified substantially in accordance with the allegations of the supporting affidavits.[9] The government rested on petitioner's case.

The hearing showed the following: About one month before the trial involving Matteo on a hijacking charge (approximately June 1966), Assistant United States Attorney Gillen learned that Zaher was a participant in the crime. He urged or demanded that Zaher testify in that trial. At about the same time the Queens County District Attorney's Office had Franzese, Matteo, Florio and Crabbe under investigation for the murder of Eleanor Cordero's late husband, Ernest Rupolo. Zaher's letter was intended to advise Matteo that Zaher would testify against Matteo in the hijacking trial and that Cordero, Parks and Smith were

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[7] Maurice Edelbaum, Franzese's attorney on the bank robbery charges, represented him at the state murder trial.

[8] The court held an evidentiary hearing on December 12, 1975. Zaher also testified at a hearing on September 29, 1975.

[9] Franzese also testified and asserted his innocence. He stated he had never seen the other defendants until the day he was arraigned. He was not certain as to whether Benji Castaldzo told him of Zaher's letter to Matteo.

urging that Matteo cooperate in the murder investigation./10

Matteo testified that he told Benji Castaldzo, an acquaintance of Franzese, to tell Franzese of the plan to implicate him (T. p. 23). Franzese moved in this court for Zaher's deposition on September 9, 1966. Franzese's supporting affidavit stated: "I believe that the said Charles E. Zaher, Jr., has very pertinent information concerning my position as a defendant in this action, more particularly my innocence." The motion was withdrawn./11

A plain reading of Zaher's letter would indicate that Zaher, together with the accomplices, planned to fabricate testimony concerning the July 21, 1965, meeting to implicate Franzese, Florio, Crabbe and Matera./12 The court is not satisfied that that was the meaning intended. In the lingo of the criminal business in which Zaher and Matteo were engaged, the letter could also be interpreted to mean that Zaher's best interests demanded that he cooperate with law

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/10 Matteo testified that Mrs. Zaher had explained the predicament Zaher found himself in as follows: Parks, Zaher and Cordaro ". . . were talking about a homicide case and they said they were going to put Sonny's name into it and a few other people and she wanted me to partake in the frameup, . . . and that if I didn't partake in it that he was going to testify against me in my hijacking trial." (H. p. 17).
(References to hearing testimony in this memorandum are preceded by "H."

/11 Pollack's affidavit states that Mrs. Zaher told him that Kleinman called her some time during the murder trial and asked her to produce the letter. She says she refused to produce the letter but told him that she would produce it if Matteo were convicted.

/12 It is interesting to note that through a casual remark by Agent Thatcher suggesting F.B.I. Director Hoover's interest in Franzese triggered the plan, Zaher testified that Florio, Crabbe and Matera were included simply because ". . . they always bragged how much they knew Sonny and we needed people who knew Sonny" (H. p. 99).

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enforcement officers. /13

HAS THE DEFENDANT SHOWN THE RIGHT TO A NEW TRIAL

The right to a new trial based on recantation testimony must satisfy the triple-prong test set forth in Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1929), and reaffirmed in this circuit in United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954), and United States v. Persico, 339 F. Supp. 1077, 1085 (E.D.N.Y. 1972), aff'd. on opinion below, 467 F.2d 845 (2d Cir. 1972), cert. denied, 410 U.S. 946, 93 S.Ct. 1360 (1973). Under this test, the defendant must:

A. satisfy the court that the testimony given by the material witness was false;

B. show that without it the jury might have reached a different conclusion; and

C. show that the party seeking a new trial was taken by surprise when the false testimony was given, and was unable to meet it or did not know of its falsity until after the trial.

A. Was Zaher's trial testimony false.

Zaher not only made an in-court identification of Franzese, but also of Crabbe, Matera and Florio (T. pp. 1449-1452). He testified he did not know Potere "personally" (T. p. 1451) and failed to make an in-court identification of him.

/13 Zaher testified at the trial charging Matteo with a hijacking offense (18 U.S.C. §659). Zaher and Matteo agree that he testified truthfully. The language could nevertheless afford Zaher a claim that with reference to Matteo the statements or testimony that he gave were fabricated or an explanation to Matteo of why he was compelled to testify truthfully.

The other accomplices testified that they had a number of meetings with Franzese at various places, i.e., a meeting at the Kew Motor Inn, 80-05 Grand Central Parkway, where Franzese, Parks, Florio and Smith were present (T. pp. 126 and 2399); a meeting at the Aqueduct Motor Inn after the July 30, 1965 robbery of the County Federal Savings and Loan Association; a meeting at the Skyway Motel near Kennedy Airport (T. p. 2542)(Smith, Parks and Cordero met with Franzese, Crabbe and Matera (T. p. 173)); a meeting at the Flagship Diner (T. p. 2618); meetings between Cordero and Franzese at the Tiki Bar (T. pp. 1917-1936); meetings at Potere's apartment, #5A, at 83-16 Lefferts Boulevard in Queens County. /14

Zaher testified during the trial that he participated in two bank robberies, the robbery of the Central Queens Savings and Loan Association on July 7, 1965, and the robbery of the Jamaica Savings Bank on July 13, 1965. He explained his failure to take part in bank robberies subsequent to the meeting of July 21 because he feared that Polisi had learned that Zaher had shown a newspaper clipping about one of the July robberies to someone. Polisi, fearing disclosure through

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/14 The apartment was leased to one John Valenti and to Potere, who used the alias Nicholas Appollo (T. p. 2445). Cordero testified he met Potere at that apartment about six times to discuss the distribution of the robbery proceeds and to plan other bank robberies and about four times with Franzese present (T. p. 1826). At one of these meetings held approximately one week after the robbery of the United Savings and Loan Association in Oceanside, New York, on August 13, 1965, Franzese reprimanded Cordero for stealing a car in front of the Kew Motor Inn (T. p. 1877). Franzese told Cordero that he had an interest in the lounge at Kew Motor Inn, known as the John Doe Room.

Zaher's boasting of or explaining his participation in the robbery, had ordered Zaher killed./15

Zaher also testified at the trial that soon after the July 21st meeting, he checked into the Crossway Motel, where he claimed he stayed for about one week, and then took a trip upstate with his wife and children to Frontier Land. He said he left on July 29 or 30 and returned on August 8, 1965 (T. pp. 1496, 1543).

At the hearing, Zaher attempted to explain his leaving town on July 30th by simply stating that the risk of bank robbery was high and that he had decided to continue his criminal career in less risky aspects of the business. The court rejects this explanation and finds that the explanation Zaher offered at the trial was closer to the truth./16

/15 The Assistant United States Attorney explained to the court, outside the hearing of the jury, that Zaher had borrowed $500 from one Benji Shinelli, a shylock, and that when Zaher was unable to repay he showed Shinelli a newspaper clipping apparently to indicate a source of income (T. pp. 1548-49). Shinelli told Polisi sometime after July 21. Thereafter in September, Shinelli called Franzese to have the contract taken off (T. pp. 1642-3). Zaher explained his failure to implicate Franzese until after he had testified at the Polisi trial as due to fear of bodily harm. He said he was told by a guard at West Street by the name of Gucci, sometime toward the end of November, 1965, "Sonny, Mr. Franzese, knows you are going against Mr. Polisi. That is O, K. But if you go any further, you are dead." (T.pp. 1701-2). He further testified at the trial that he had had Cordero cut his wrists with a razor on September 29, 1965, in a faked suicide attempt (T. pp. 1545-6), because "I did not want to testify in this trial or any other trial" (T. p. 1545).

/16 In his affidavit (dated September 19, 1975), Zaher points to the call he made on October 1, 1965, after Parks was arrested, as proof that he was not in fear of Polisi. He called on Polisi to collect a portion of money Polisi owed Parks (T. p. 604). The trial testimony, however, indicates that by that time, the order to kill Zaher had been countermanded, and that Zaher had called on Polisi to fullfil the agreement to Parks to bail him out (T. pp. 1564, 1735-8).

At the hearing, Zaher portrayed his accomplices, Parks, Smith and Cordero as cunning, careful plotters who persisted, inexorably, over a period of almost a year in refining all the details of their fabrication. The trial testimony stands firm under the attack. If the trial testimony were fabricated, the failure to put Potere at the meeting is inexplicable. The failure to identify Potere at the trial as one with whom he had done business lends further support to the trial testimony. Petitioner's Exhibit 7 in evidence at the hearing, a post-card from the North Pole postmarked July 31, 1965, corrobrated Zaher's trial testimony that he left town on July 30th. Zaher's protestation of threats made by his accomplices and threats and suggestions for him to cooperate with the government are not borne out by the trial testimony.

Smith and Parks were arrested in the early hours of September 30, 1965, outside the Aqueduct Motor Inn (T. pp. 237 and 2557). Smith was housed at the Nassau County Jail upon his arrest. Parks was held at the Federal Detention Headquarters at West Street in Manhattan. Cordero was arrested the next day on October 1, 1965. He was also held at West Street, but did not see Parks until October 3, 1965 (T. pp. 1963-1964). Zaher was not arrested until October 8, 1965. He had previously entered the United States Public Health Service Hospital (T. p. 1565), at Lexington, Kentucky, for about a week prior to his arrest. When Zaher was arrested he was an active addict and had experienced withdrawal symptoms for a few days (T. p. 1463).

Zaher was arraigned before a commissioner on the day of his arrest. Zaher was not advised until October 14, 1965 at the

courthouse that Parks and Cordero had made statements implicating Polisi. They all agreed at that time that they would not implicate Franzese (T. p. 1045). In the meantime, and on October 9, 1965, Zaher wrote two letters, one of which he indicated that he wished "to make a statement concerning my case," and in the second he said,

> I think all [sic] do better if I talk. For instance, I know where the arsenal of guns are, when they sneak out of the motel, machine gun, two shotguns, one carbine rifle and one M-I rifle and 38, 32, 22 pistols (T. p. 1535).

Zaher was willing to cooperate, and he decided to do so on October 9, 1965, voluntarily and free of any influences. His decision not to name Franzese, Crabbe, Matera and Florio was prompted by fear of his life.

The truthfulness of Zaher's affidavit and hearing testimony is further cast in doubt through his recounting of events subsequent to his release from prison. He attempts to account for the long delay in exposing his perjury by describing a vain attempt to see Maurice Edelbaum, Franzese's lawyer, soon after he was released in September, 1968. He says he told Edelbaum that he had committed perjury and that Edelbaum summarily dismissed him. /17

/17 Zaher's version is supported by an affidavit by Pollack, Franzese's present lawyer, which states that Edelbaum confirmed the incident. Edelbaum was not called to testify at the hearing. However, the court notes that at the time that Zaher was supposed to have told Edelbaum of his perjury, Edelbaum took no action even though Franzese had not yet exhausted his appellate remedy. Franzese's case had been remanded to this court by the Supreme Court, for a hearing on whether there had been an illegal search and seizure, sub.nom. Giordano v. United States, 394 U.S. 310. 89 S.Ct. 1163 (1969).

Soon after Zaher was rebuffed by Edelbaum, he visited former Assistant United States Attorney Gillen and sought his advice about starting a civil action against Life Magazine for breaching a promise allegedly made to him during the murder trial in Queens County. Zaher did not tell Gillen that he wanted to reveal the machinations of his accomplices which had forced him to lie at the trial, or that he had seen Mr. Edelbaum concerning the same. Zaher admits that over a period of years he alternately told his wife that the testimony he gave at the trial was a lie, and that it was the truth. Zaher reaffirmed the truth of his trial testimony in a telephone conversation with Special Agent Talia on December 10, 1974. /18

Motions for a new trial based on recantation testimony are viewed with utmost suspicion, United States v. Troche, supra at 403, United States v. Persico, supra at 1084-85. The court is reasonably well satisfied that the testimony given by Zaher at the trial was true.

B. Would Zaher's new testimony be likely to produce a different verdict.

Zaher's testimony as he now claims it to be fails to account for Potere's participation in the conspiracy. At the trial, credible testimony by accomplices and others pointed unmistakably to Potere's participation in the conspiracy. From the inception of the case it was the government's contention that Tony Polisi was the

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/18 The petitioner moved for a new trial based on an affidavit by Eleanor Cordero pointing to certain testimony at the trial as false. In addition to reaffirming the truth of his own testimony at the trial (H. p. 116), Zaher advised Agent Talia that Eleanor Cordero was lying (H. p. 138).

manager of the criminal venture and that Franzese had masterminded the entire operation. It was the dissatisfaction of Parks, Smith and Cordero that brought about the meeting of July 21, 1965 (T. p. 2372). Thereafter, Franzese attempted to remain in the background, directing the operation through Florio, Crabbe, Matera and Potere. Potere was accessible to Cordero, Smith and Parks. It was Potere who supplied the apartment on Lefferts Boulevard for periodic meetings with the bank robbers; it was Potere who discussed plans for robbing banks (T. pp. 2377-8); it was Potere who cased banks with Parks and Cordero (T. pp. 2379, 2382). It was Potere who partially made good on Franzese's promise to supply bail money and family support for the arrested bank robbers: Julius Itkowitz, an attorney who represented Parks, spoke with Potere and advised him that Parks wanted "repayment of a loan," meaning bail money, on October 13, 1965. Potere mailed two checks to Itkowitz, one for $250, and the other for $1,000 (T. pp. 2696 and 2710). Robert Helfand, attorney for Cordero, also called Potere; he advised Potere that Cordero asked him to call and say that his wife needed money to live on (T. p. 2697). Potere made a payment to Helfand for Cordero's wife (T. pp. 2785-7, 2797). In sum, Zaher's recantation testimony fails to describe Potere's role in the conspiracy as it was clearly established by the trial record.

Evidence that would directly contradict Zaher's claim, that the plan to implicate Franzese was hatched after the Polisi trial, was offered through Mr. Helfand's testimony; he testified (out of the hearing of the jury):

> The first time I saw him [Cordero] in Federal Prison in New York, which would be in October, 1965. He said he wished to cooperate and talk, and he said he would involve Sonny Franzese.
>
> . . . .
>
> He said something about Franzese being involved in the disposing of money orders that had been taken in the bank robberies (T. p. 2812).

The court sustained defendant's objection to the testimony on the ground that the defendant's cross-examination would not clearly challenge the accomplices' version as a recent fabrication. The testimony, however, would have been admissible had Zaher's testimony, as he now claims it to be, been offered at the trial. United States v. De la Motte, 434 F.2d 289, 293 (2d Cir. 1970), cert. denied, 401 U.S. 921, 91 S.Ct. 910 (1971); Felice v. Long Island R.R., 426 F.2d 192, 198 (2d Cir. 1970); 4 J. Wigmore, Evidence §1129 (Chadbourne rev. 1972).

In United States v. Stofsky, Docket Nos. 74-1860, etc., Slip Op. at 523-4 (2d Cir. Nov. 7, 1975), the court said:

> At the threshold it must be recognized that in the interest of according finality to a jury's verdict, a motion for a new trial based upon previously-undiscovered evidence is ordinarily "not favored and should be granted only with caution." United States v. Costello, 255 F.2d 876, 879 (2d Cir.) cert. denied, 357 U.S. 937 (1958); United States Sposato, 446 F.2d 779 (2d Cir. 1971). Indeed, the standard of review governing most instances of newly-discovered evidence, first enunciated in Berry v. Georgia, 10 Ga. 511, 527 (1851), and steadfastly adhered to for over a century, is that the new evidence will not entitle the defendant to a new trial unless "it would probably produce a different verdict." See United States v. De Sapio, 456 F.2d 644, 647 (2d Cir.) cert. denied, 406 U.S. 933 (1972); United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969); 8A Moore's Federal Procedure §33.04(1).

If Zaher's recantation testimony were placed before the jury, and he testified that Parks, Smith and Cordero fabricated their testimony implicating Franzese, it would probably not produce a different verdict.

C. Was Franzese surprised by Zaher's testimony at the trial.

The court finds that Franzese was aware of the contents of Zaher's letter to Matteo soon after it was smuggled out of the Danbury Correctional Institution in May or June of 1966. Therefore, Zaher's testimony attacking the credibility of the accomplices testimony could have been discovered in the exercise of due diligence. This failure alone requires denial of the relief Franzese requests. United States v. Stofsky, supra, Slip Op. at 527, citing United States v. Costello, 225 F.2d 866, 879 (2d Cir.), cert. denied, 357 U.S. 937, 78 S.Ct. 1385 (1958).

The petitioner has failed to meet any of the Larrison tests. The motion is in all respects denied, and it is

SO ORDERED.

U. S. D. J.

A No.

Q Now, have you ever robbed any banks, Mr. Zaher?

A Yes.

Q What banks and when?

A Queens Central, July 7th, and Jamaica Savings, July 13th.

Q Is that 1965?

A Correct.

Q Now, have you ever been arrested for those robberies?

A Yes.

Q Did you enter any pleas to those robberies?

A Yes.

Q What did you plead?

A Guilty.

Q What is your present status in connection with those bank robberies?

A I am awaiting sentence.

Q I see.

Now, do you know the defendant John Franzese?

A Yes, I do.

Q Would you identify him for the Court and

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jury, please?

A Right there, right next to his counsel.

THE COURT: Will you stand, Mr. Franzese, please.

(The defendant John Franzese then stands in the courtroom.)

THE COURT: Is that the man you pointed to?

THE WITNESS: Yes.

THE COURT: Let the record show that this witness pointed out the defendant John Franzese.

BY MR. GILLEN:

Q Will you tell us, do you know him by any other name?

A Sonny Franzese.

Q And do you know the defendant John Matera?

A Yes, I do.

Q Will you point him out to the Court and Jury, please?

A Yes.

THE COURT: Mr. Matera, will you please stand.

(The defendant John Matera then stood in the courtroom.)

THE WITNESS: Yes.

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THE COURT: Let the record show that the witness pointed out the defendant Charles Matera — is it Charles Matera?

THE WITNESS: John Matera.

THE COURT: John Matera.

BY MR. GILLEN:

Q Do you know him by any other name?

A Yes, Johnny Irish.

Q Do you know the defendant William Crabbe?

A Yes, I do.

Q Will you point him out to the Court and Jury?

A That is Mr. Crabbe.

(The defendant William David Crabbe then stood in the courtroom.)

THE COURT: Let the record show the witness pointed out the defendant —

MR. GILLEN: Crabbe.

THE COURT: Yes, William David Crabbe.

MR. GILLEN: Yes, sir.

Q Do you know him by any other name?

A Red Crabbe.

Q Do you know the defendant Nicholas Potere?

A Not personally, no.

Zaher-direct

Q Did you ever meet Mr. Potere?

A No.

Q Do you know the defendant Joseph Florio?

A Yes, I do.

Q Would you point him out to the Court and jury, please?

A There he is.

(Joseph M. Florio, the defendant, then stood in the courtroom.)

THE COURT: Let the record show the witness pointed out the defendant Joseph M. Florio.

BY MR. GILLEN:

Q Do you know him by any other name?

A Whitey.

Q Do you know a man by the name of Anhtony Polisi?

A Yes, I do.

Q Do you know a man by the name of Salvatore Polisi?

A Yes, I do.

Q Do you know a man by the name of Richard Parks?

A Yes.

Q Do you know a man by the name of James Smith?

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A Yes.

Q Did you know him by any other name?

A Yes, Jimmy Ryan.

Q Do you know a man by the name of John Cordero?

A Yes.

Q And did you know him by any other name?

A Blueboy.

Q Do you know a woman by the name of Eleanor Cordero?

A Yes, I do.

Q Is she related to John Cordero?

A They are married.

Q Did you know a girl by the name of Anne Messineo?

A No, I don't.

Q Did you know a girl by the name of Carol Salzo?

A I just met her once.

Q Will you tell us, please, when did you first meet Mr. Franzese?

A November, '64.

Q And where did this meeting take place?

Zaher-direct

Q Where is that, Brooklyn?

A Crescent and Fulton, Brooklyn.

Q Were you introduced to him by anyone?

A Yes.

Q Now, how long have you known Mr. Matera?

A Since May of '64.

MR. BROWN: May I have the date?

MR. GILLEN: May of '64.

MR. BROWN: Thank you.

BY MR. GILLEN:

Q And Mr. Crabbe, how long have you known him?

A Approximately the same time.

Q Mr. Potere, you told us you didn't know?

A Right.

Q How long have you known Mr. Florio?

A I knew him just a little longer, maybe a month or more.

Q A little more than what, give us your best recollection?

A A little longer than May of '64, probably April.

MR. VITELLO: What was that date?

THE COURT: Will you read it, please, read back the answer.

(The Reporter then repeated the answer.)

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BY MR. GILLEN:

Q How long have you known Anthony Polisi?

A I met him around April of '65.

Q And Salvatore?

A Excuse me, I met Tony -- I thought you were talking about his son -- I met Tony in December of '64 and I met his son in '65.

Q When in '65 did you meet his son?

A I was never introduced to him but I got acquainted with him at the bar at the motel.

Q About when?

A April, May, June.

Q Of when, 1964?

A 1965.

Q Will you speak up a little more, please, will you speak to me.

Mr. Parks, how long have you known him?

A I went to grammar school with Mr. Parks.

MR. BRILL: I can't hear.

THE COURT: Would you please repeat the answer.

(The last answer was read.)

Q And Mr. Smith, how long have you known Mr. Smith?

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A Since June of '65.

Q And Mr. Cordero, how long have you known him?

A June of '65.

Q And Mrs. Cordero, how long have you known her?

A Around April of '65.

Q Now, did you ever hear of an Aqueduct Motor Inn?

A Yes.

Q Where is that located?

A 114th Street and Rockaway Boulevard.

Q Who is the proprietor or owner of that inn?

A Tony Polisi.

Q Now, in or about July 19th to 21st of 1965 did you have occasion to go to the Aqueduct Motor Inn?

A Yes, I did.

Q And whom did you go there with?

A Mr. Cordero.

Q And did you meet anyone when you went to this Motor Inn?

A Yes.

Q Now, what time of the day or evening did you go to the Aqueduct?

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A It was approximately 3 o'clock at night.

Q And whom did you meet?

A Mr. Francese, Mr. Matera, Mr. Crabbe, Mr. Florio and Mr. Cordero was there and myself.

Q And where did you see them, in what part of the Aqueduct?

A It was in a room on the second floor.

Q Did you go directly to the second floor?

A No, I was at the bar, Mr. Crabbe came down to tell me he wanted to see me upstairs.

Q Whom were you at the bar with at the Aqueduct?

A Mr. Parks and Mr. Smith.

Q And who came down to tell you to come up?

A Mr. Crabbe.

Q Did Mr. Cordero go up with you at that time?

A He was already up there.

Q Well, how long did he go up, did anyone tell him to go up?

A He, and Cordero walked into the bar, Tony Polisi came down and grabbed ahold of him and brought him upstairs.

Q Now, did you have a conversation in that room?

A Yes.

Q Now, can you tell us, please, will you tell us please what that conversation was -- was it about bank robberies?

A Yes, it was.

Q Will you tell us did you talk about other things, other than that?

A Yes.

Q Now, will you tell us, please, in that conversation if anything was said by Mr. Franzese?

A Yes.

Q What was said and who was present?

A Well, Mr. Cordero was speaking to Mr. Franzese at the time when he told him we were pretty disgusted with the last two robberies that Mr. Polini had sent us out, the first bank robbery we were supposed to get $50,000 in cash, instead we got bonds, and in the second bank robbery which we stuck up a few weeks later --

MR. EDELBAUM: Just a moment, your Honor, I'm afraid I didn't get that last.

THE COURT: Let us have the last part of the answer read.

(Whereupon the reporter complied with the request.)

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BY MR. CULLEN:

Q Who was saying this?

A Mr. Cordero was speaking to Mr. Franzese.

Q Did Mr. Franzese say anything?

A Well then, I told Mr. Franzese that I was having a hard time stealing cars, and Mr. Franzese said:

"Okay, from now on I will take care of these banks personally, from the bank right on down to the stealing of cars."

And he said, "As Tony told you, 'If anybody gets arrested I will make sure they are bailed out and they'll have a lawyer, and if you do get sent away" --

MR. VITELLO: If your Honor pleases, I can't hear --

THE COURT: Will you please repeat the whole answer.

(The last answer was read.)

A (Continuing) "-- sent away I will make sure that your family gets some money every month."

Then he says, "From now on if you want to reach me you contact me through anybody in the room, and whatever they tell you to do you do it because the order is coming from me."

The only other person having anything to

Fisher-direct

room was Mr. Crabbe, he slapped me on the back and said, "Don't worry about nothing. Any time you get arrested we will always be there."

****

(Continued on next page.)

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Yew for robbing the car up here on one of the bank robberies.

Q. Any other conversation at that time?

A. No, just for me to better get out of the bar.

Q. Now, did you take part in any bank robberies after this July 21st date?

A. No, I didn't.

Q. Did you leave the city of New York?

A. Yes, I did.

Q. Where did you go?

A. Well, first I took a trip upstate here, and second of all, I was checked into Lexington, Kentucky.

Q. Are you a narcotic addict?

A. Yes, I am.

Q. When is the last time that you had any narcotics, Mr. Zaher.

A. Well, I was arrested October the 8th, and I believe at West Street I was given morphine for a day or two.

Q. I see.

Now, there came a time when you learned that Mr. Parks, Mr. Smith and Mr. Cordero were arrested?

THE COURT: Excuse me. What year, October?

THE WITNESS: 1965, your Honor.

THE COURT: I see.

Q. There came a time, you just said, when you learned-- I withdraw that. Did there come a time when you

Q And you went back to using drugs?

A Yes.

Q And before you went to Lexington, Kentucky, during September, you say you stayed for a few days at the Crossway Motel?

A Yes.

Q You stay at any other motel during September?

A No, I did not.

Q How about during August?

A Well, August, I took a trip upstate, around this vicinity, and I stayed at several hotels and motels.

Q Well, can you give us the names of some of the hotels and motels you stayed and when it was?

A I took the trip August--I believe it was July 29th to August 8th.

Q July 29th to August 8th, sir?

A Yes.

Q And where did you stay. Give me the names of the hotels.

A I don't recall any names.

Q Can't you give me---

A Well, I went up through Frontier Town with my wife and children and went up to the North Pole.

MR. GILLEN: Your Honor, I can't hear.

THE COURT: Will you repeat it, Mr. Jordan?

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Q How about Mr. Parks?

A Yes.

Q When did you speak with Mr. Parks concerning any robbery, when did you have any conversation with him at all--

MR. GILLIS: Your Honor, I will object at this time.

If we would go just to side bar, the questions are very broad--

THE COURT: The jury may be excused.

MR. EDELSON: I will withdraw the question to save the jury from being removed.

THE COURT: All right.

Q When did you talk with Mr. Parks about any bank robbery?

A I didn't talk to Mr. Parks about any bank robbery--

Q Who is the first person--

THE COURT: I don't think you completed your answer.

A (Continuing) --until the actual robbery.

Q You mean the day of the robbery?

A Yes, sir.

Q Did you obtain the car three or four weeks

before the robbery?

A Not, three weeks prior, but I didn't know what type of robbery, it was just that it was a robbery.

THE COURT: You will have to talk up much louder, Mr. Weber.

Q The first bank robbery that you were involved with was on July 7th, wasn't it?

A Yes.

Q And three weeks before you had a talk with whom? Mr. Parks or Mr. Cordero or Mr. Smith?

A Mr. Parks.

Q About some robbery without indicating what type of robbery it was; is that right?

A Right.

Q And did he ask you to steal a car?

A Well, he came up to the bar and he asked me if I was interested on driving on a stickup.

Q And you told him you were?

A Yes.

Q Did he tell you who else was being involved in the stickup?

A Well, I asked him how much money it was and who else was involved and he said, he says, 'Everything hasn't materialized yet, but we must steal the car today. Come down to the [illegible], Sal [illegible] up

are going to pick up a car."

THE COURT: I don't think that was heard.

MR. HELLMAN: Will you speak a little slower.

THE COURT: Mr. Kerr, please read the last answer.

(The last answer was read.)

BY MR. HELLMAN:

Q And that would be about three weeks before July 7th?

A Approximately, yes.

Q At that time-- up to that time had you met Smith?

A Yes.

Q And when had he been introduced to you?

A In June.

Q Well, we are in June, we are talking about three weeks before July 7th.

A You asked me when I was introduced to him, I said June.

Q What part-- all right, I am sorry.

MR. GILLEN: I object, your Honor.

Q What part of June?

A It was right after I met Gandolfo.

Q What?

A I got ten slash marks on my arm. I did a few, and it was not deep enough to bleed, so I couldn't do enough. I asked him if he would do the rest, because I just didn't have nerve enough to do bodily harm to myself?

Q He cut an artery, didn't he?

A I believe he did, yes.

Q During the time that you were in the dormitory with Cordero, did he give you any pills?

A No.

MR. EDELBAUM: I am going to ask for some documents.

THE COURT: Yes. The jury may be excused. You may step down, Mr. Zaher.

(Thereupon, at this point, the jury retired from the courtroom and the witness was withdrawn from the courtroom.)

MR. EDELBAUM: Your Honor, I ask if The Government has in its possession any report of any interview at which the F.B.I. agents were present when Mr. Zaher informed the Government about this incident with the agent Cuccia. I also ask at this time if the Government has in its possession any reports about

any investigation concerning that agent.

THE COURT: You mean Officer Cuccia?

MR. EDELBAUM: Officer Cuccia. About this incident. If there are any reports in existence, I would like to look at them.

MR. GILLEN: I will say this, Your Honor, we have none here now, but this Cuccia is serving a year and a day sentence for carrying contraband in and out of West Street, but there is a report---

MR. EDELBAUM: About this incident is all I am interested in.

MR. GILLEN: I have nothing in my possession at the moment as to this incident.

THE COURT: Will you please check, Mr. Gillen. Can you do that now and find whether you do have a statement? I don't this witness testified that the F.B.I. agents took the statement down.

MR. EDELBAUM: No, Your Honor. This is what I say. It is my experience whenever F.B.I. agents are present at any inquiry they make a report to a superior officer. I would like to know if there is any such report.

THE COURT: I presume they did it in

this case. Can you go on, Mr. Edelbaum.

MR. EDELBAUM: I have no further re-cross.

THE COURT: Can we continue the cross and in the meantime have the Government check it.

MR. EDELBAUM: And reserve the right---

THE COURT: Yes, and reserve your right.

MR. EDELBAUM: (Continuing) ---to recall this witness. I don't want to delay the trial.

MR. GILLEN: I can categorically state I don't have such a statement with me. Now, there may be information turned over by the agents present to other agents who then made an investigation.

THE COURT: Any statements of this witness that are contained in any report.

MR. GILLEN: All right.

THE COURT: When will you be able to give us an answer on that?

MR. GILLEN: Will you bear with me a moment, Your Honor.

THE COURT: Sure.

MR. GILLEN: We have no report on that

Your Honor, on Mr. Cuccia, because apparently at the time the investigation was conducted with Mr. Cuccia, it was just about complete on Mr. Cuccia.

THE COURT: I would like Mr.--what is your name again?

MR. THATCHER: Thatcher.

THE COURT: I would like Mr. Thatcher to tell us what investigation he made and what efforts he has made to try to locate the report. I know reference was made to it before, so it is no surprise to me. All right, I would like an answer for the record. I want to know what you did and if the report is in existence.

AHE/vm
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MR. THATCHER: There was no report made of the conversation the witness referred to, your Honor.

There was an investigation already underway by our agency concerning Salvatore Cuccia and several other individuals employed at West Street.

THE COURT: How do you spell the name again?

MR. THATCHER: C-u-c-c-i-a.

THE COURT: Did you ever ask Mr. Cuccia, or did you have a statement from Mr. Cuccia as to whether he participated in the conversations that this witness testified to?

MR. THATCHER: The FBI never interviewed Mr. Cuccia concerning Mr. Zaher's testimony, sir.

THE COURT: And you say the conversation that Mr. Zaher said he had was never reported any place, and you have looked into all the possible files where it might be?

MR. THATCHER: That's right, your

Honor.

This was in the presence of Mr. Gillen during a pretrial conference for the United States versus Polisi trial of January.

THE COURT: Wouldn't you normally report that?

MR. THATCHER: No, sir.

THE COURT: I see.

MR. THATCHER: No, sir.

THE COURT: Why not?

MR. THATCHER: Mr. Gillen was conducting the interview. We were merely present in Mr. Gillen's office at the time.

THE COURT: Mr. Gillen, do you have any notes?

MR. GILLEN: No, sir, not on this incident.

THE COURT: You didn't take them down?

MR. GILLEN: No.

THE COURT: You say you didn't take them down or you had them and destroyed them?

MR. GILLEN: I don't think I even took any notes at the time, your Honor, because these individuals, at the time, were telling us all kinds of things in West Street, and it was really more in the nature of just talking and batting the breeze almost, because we had a specific purpose in mind at that time and that wasn't it.

THE COURT: All right, the Government represents that it has no 3500 statements concerning the testimony that this witness gave on recross examination other than what they have already received.

MR. LEIBOWITZ: Very well, your Honor.

MR. JAFFE: May we have, Judge, the reports or any material with respect to the abortive and fake suicide that the witness described? We have testimony that the artery --

THE COURT: I think they are already in some 3500 statements.

MR. GILLEN: I think he is referring

correction, and it is true and correct to the best of my knowledge."

BY MR. EDELBAUM:

Q Mr. Parks,--Mr. Baker, was a red Pontiac car, a new red Pontiac car you used in the robbery, the bank robbery of July 7th?

A Yes.

Q Now when were you arrested?

A October 8th.

Q And when you were arrested on October 8th, had Cordero been arrested?

A Yes.

Q How had you learned that?

A Heard it on the radio.

Q And where were you when you were arrested, sir?

A Home.

Q And you were taken to F.B.I. headquarters?

A Yes.

MR. EDELBAUM: Will Your Honor bear with me, please.

Q On that day, did you ever tell--question withdrawn. Were you interviewed by Special Agents William Joyce, John S. Ruscich and Edward H. Ancom?

A I don't know who they were.

Q Do you remember three agents?

A Yes, I do.

Q And did you deny to those agents that you had anything to do with bank robberies or stealing any cars?

A Yes.

Q How did there come a time when you learned that Mr. Cordero had made a statement about your implication and his implication in these bank robberies?

A Yes.

Q And how soon after you were arrested--question withdrawn. Did you learn about this before you were arrested or after you were arrested?

A After I was arrested.

Q And how soon after you were arrested did you learn this, sir?

A Couple of weeks. A week.

Q Did you learn that he had--question withdrawn. Did you agree to cooperate before--question withdrawn. There came a time when you did agree to cooperate with the Government; is that right?

A Yes.

Q Did you agree to do that before you learned that Cordero had made a statement or after?

A Before.

Q Did you learn whether or not Parks had made a statement?

A I didn't know if he made one or not.

Q Now, when you were interviewed by the F.B.I., did anybody tell you that you could help yourself?

A Yes.

Q And who told you that?

A Mr. Gillen, when I was brought up that day, when I was arraigned.

Q The day---

A That I was arraigned.

Q Were you arraigned the same date that you were arrested, sir?

A Yes, I was.

Zaher-cross

BY MR. ADELBAUM:

Q As a matter of fact, didn't you sign two statements on October 9th concerning a request to see the petition --

A Why I use it --

Q (continuing) -- because I don't have the original, this is a typewritten copy given to me by Mr. Gillen?

(Document handed to the witness.)

Q Is that true, Mr. Zaher?

A Yes.

Q Mr. Francisco is an official at the Federal House of Detention; isn't that right, sir?

A I don't know.

Q Have you ever met him?

A No.

Q Now, did you send a statement to the office of the Federal House of Detention reading as follows:

"Attention of the D.A. who is handling my case.

"I wish to make a statement concerning my case.

"Signed Charles Zaher, Jr., number 20411-57:"

Zuber-cross

Did you do that?

A Yes, sir.

Q And then on that same day did you also sign this statement from you:

"I wish to make a statement in the matter of my case.

"I thought it over and I think all do better if I talk. For --" "-- for" -- I don't know what this word is.

MR. EHRLICH: Can you help me, Mr. Gillen, this typewritten word, I don't know what it is.

MR. GILLEN: Which one?

MR. EHRLICH: This (indicating).

I don't have the original so I don't know what that is.

MR. GILLEN: That is a copy of the original.

Maybe he can help you --

MR. VITELLO: "For instance."

BY MR. EHRLICH:

Q "I think all do better if I talk. For [illegible], I know you have the original of this here, [illegible]

Fisher-cross

two shotguns, one carbine rifle and one M-1 rifle and 38, 32, 22 pistols."

Did you write that?

A Yes, I did.

Q And did some members of the FBI come to see you?

A Yes, sir.

Q Was that on two days later, on October the 11th?

A Yes.

Q And on October 11th, did you tell them that a man named Tyler Somers, a close friend of Richard Parks, had all of the guns that Tony Tulisi was holding for Parks at the Aqueduct Motel?

MR. GILLEN: Mr. Edelbaum, will you excuse me?

MR. EDELBAUM: I am sorry, I beg your pardon?

(Mr. Edelbaum then walked away from the position he was in.)

MR. GILLEN: Thank you.

BY MR. MILLMAN:

Q Did you tell them that?

A Yes, sir.

Q And did you tell them that the last time

Zahler-cross

you say those guns was at Somers' residence on October 6th, 1959, just a few days before, two days before you were arrested?

A Yes, sir.

Q And did you tell the FBI on that day that Tyler Somers provided most of the guns used by you, Parks, Cordero and Smith in the bank robberies?

A Yes. Somers sold the guns to Mr. Polisi prior to the bank robberies.

Q On that day you also made a statement, did you not, about the July 13th robbery, bank robbery; is that right?

A Yes, sir.

Q And is this your statement that you signed sir, the original statement that you signed?

(The witness was handed a document and perused it.)

BY MR. FEINBAUM:

Q Did you sign that statement?

A Yes, sir.

Q Did you steal a car for that robbery?

A Yes, sir.

Q When did you steal it?

A [illegible]

Zaber-cross

Q Isn't it a fact that the night before the robbery that --

MR. GILLEN: Excuse me, please.

MR. [illegible]: I am sorry.

Q The night before the robbery, July 13th, you, Parks, Smith, Sal Polici went to 98th Street and Rockaway Boulevard and stole a 1951 black Buick from a gas station?

MR. GILLEN: Objection, your Honor.

THE COURT: Overruled, I will allow it.

Q Isn't that the fact?

A I don't know when I recall stealing the car, it could have been a couple of days, it might have been the night --

MR. GILLEN: I can't hear the witness, your Honor.

THE COURT: Will you repeat that answer, please.

(The reporter repeated the answer.)

A The night before.

This is on Jamaica Savings, I can't pinpoint what day I stole the car. It might have been, I believe it was two days before the robbery.

Baker-cross

Is that the car that was stolen?

THE WITNESS: A '61 Buick.

***

(Continued on next page.)

MR. GILLEN: Objection.

THE COURT: Objection sustained.

Q Did you get what you were supposed to get?

MR. GILLEN: Objection, Your Honor.

THE COURT: I will allow that.

A All I knew is I got $1,000.

Q Did you tell the F.B.I. in your statement on October 11 concerning this robbery that you got about $2,000?

A I gave them a round figure.

Q All right. Now this was the 15th of July when this robbery took place; is that right?

A Yes.

Q And that was the Jamaica Savings, am I correct?

A Yes.

Q About a week or so later, did you have a talk with Mr. Parks about the robbery at all, this is the Jamaica Savings robbery?

A Yes.

Q And was it a week or so later when Parks told you that Tony Polisi was going to have you killed because you talked to someone about the bank robbery?

A Yes.

Q And did you take off---did you go away?

A Yes, I did.

Q Let's see if we can have this---question withdrawn.

Q How long did you stay away, about?

A Out of the neighborhood or---

Q You say you took off. Let's find out where you went. Where did you go?

A I believed I checked into the Crossway at that time, or the Fair Motor Inn.

Q And where is that in reference to the---

A LaGuardia Airport.

Q Laguardia Airport?

A Yes.

Q Now, under what name did you check in there?

A I generally used George Kelly. That is my alias.

Q George Kelly?

A I generally checked. I used various names.

THE COURT: You didn't use Zaher?

THE WITNESS: I might have or I might not. I used various names.

THE COURT: At this particular time when you checked in.

THE WITNESS: I don't recall, Your Honor.

BY MR. EHRLICH:

Q Could we fix more definitely, Mr. Zaher, when it was that Mr. Parks had this conversation with you, when you say a week or so later. The robbery took place

on July 13th. A week or so later--was it more than a week, less than a week; how long was it, sir?

A It was right after the meeting with Mr. Francese.

MR. BRILL: I can't hear him again, sir.

THE COURT: Will you repeat that, Mr. Jordan?

(The Court reporter repeated the answer as above recorded.)

Q When do you say the meeting was with Mr. Francese?

A The 21st.

Q The 21st. And you checked in to the--what motel?

A It was the Fair Motor Inn or the Crossway Motor Inn.

Q I heard the Crossway.

A The Crossway or the Fair Motor Inn.

Q Fair?

A Yes.

Q Where is the Fair Motor Inn?

A It is on Long Island Expressway, up around near LaGuardia Airport.

Q And how long did you stay there altogether?

A I stayed there until I believe it was July 30th when I took the trip with my wife and children upstate New York.

Q Are you also known as Blackie?

Zahler-cross

A I showed -- I showed an individual clipping. It could have been the 8th, 9th or 10th.

Q The 8th, 9th or 10th?

A Right.

Q And that got back to Polisi, didn't it?

A Yes, it did.

Q And it was after that first robbery when you talked about that first robbery that it got back to Polisi and Parks then told you, after that, that Polisi was going to have you killed?

A It didn't get back to Mr. Polisi until after the meeting.

Q But was it after Mr. Parks -- did Mr. Parks tell you that he was -- that you were to be killed?

A Yes, he did.

Q And that Mr. Polisi had ordered it, is that right?

A Yes.

Q And now Parks and Smith were arrested, right?

A Yes.

Q And you went straight to Polisi, you told [illegible] money from Mr. Polisi for bail; isn't

Zaher-cross

A Yes.

Q You weren't afraid of Mr. Polisi any more?

A I was -- I got it straightened out prior to going to him.

This person I told wasn't -- it was one of his money lenders.

Q One of Polisi's money lenders?

A Right.

Q Now, tell me, was Parks, Cordero and Smith the gunmen who were supposed to kill you?

A Yes.

Q And isn't it a fact that when you went to Polisi, when you came back, after you found out they were in jail, you went to Polisi because you weren't afraid any more because his gunmen were in jail; isn't that right?

A That's correct.

Q And it is a fact when you told the FBI on October the 11th about the July 7th and the July 13th robberies, up to that time, you hadn't spoken a word to Parks, to Cordero or Smith; right?

A I don't recall making that statement.

Q Well, let me see.

Parks was arrested -- I mean, Smith was

A Right.

Q From September 30th to October the 11th, had you seen or spoken to Smith?

A In jail?

Q In jail.

A No.

Q Parks was arrested on September 30th, is that right?

A That's right.

Q Had you seen or spoken to Smith from that date -- to Parks from that date until October the 11th?

MR. GILLEN: I object, your Honor. I think there's a little confusion.

THE COURT: Please read the question back.

MR. EDELBAUM: I will reframe it to avoid reading it back, Judge.

Q Parks was arrested on September 30th, is that right?

A Right.

Q You gave the statement to the FBI on October the 11th, right?

A Right.

Q Before you gave the statement to the FBI,

Zaher-cross

A No.

Q Had you spoken to Smith?

A No.

Q Had you spoken to Cordero?

A No.

Q You hadn't had any opportunity to speak to any one of the three, is that right?

A Correct.

****

(Continued on next page.)

Now, your Honor, I have an offer which I would like to argue in the absence of the jury and--

THE COURT: The jury may be excused.

MR. EHRLICHMAN: And I will have no more questions of this witness.

THE COURT: The jury may be excused.

(At 4:05 p.m. the jury left the courtroom.)

(The witness left the courtroom.)

MR. EHRLICHMAN: I now offer all of government's exhibit for identification into evidence and all of 101 for identification in evidence.

MR. GRIMM: Objection, your Honor.

MR. EHRLICHMAN: The purpose is, your Honor, in view of the last few statements of this witness that without any opportunity to talk to any of the co-defendants he made these statements to the FBI, and I think that the jury is entitled to know everything he told the FBI on that day after he agreed to cooperate, that is from those statements, and only, in the course of his

other.

THE COURT: May I see them.

MR. EDELBAUM: Yes, your Honor.

(Documents handed to the Court.)

MR. EDELBAUM: Your Honor, when I said co-defendants, I meant the other witnesses, your Honor.

THE COURT: What is your objection?

MR. GRIMM: Your Honor, those statements, I don't see any inconsistency between this witness' testimony and those signed statements.

Now, I think Mr. Edelbaum has alluded that he didn't talk to-- I don't know whether he said see or talk to-- these individuals.

I don't know whether it is quite clear whether he meant to talk to them at all or to talk to them about the facts of this case or to talk to them about anything else.

THE COURT: If I understand the theory of the other, it is not that this witness is offered, having testified to a

that he would talk over the planning and everything up to and including the stealing of the cars, he was saying in effect that Mr. Furnace was the boss.

MR. GILLEN: Yes, but this preceded these meetings.

THE COURT: Wait a minute now. The theory is that this is all a fabrication and that these statements tend to show that because the whole tenor of the statements is that Mr. Polisi was the boss.

Now, of course, I can see no inconsistencies if one places these statements in the time, the proper time perspective. I can see where they are consistent if the United States government's theory is, yes, that Mr. Polisi was the boss until after the Central Queens robbery.

MR. GILLEN: I withdraw my objection, your Honor.

THE COURT: There might be an inconsistency in claiming that at that time Mr. Furnace was the boss, but it is claimed that at a later meeting this--

MR. GILLEN: May I say, I am

see that, your Honor, I will withdraw the objection.

THE COURT: Now, that is a possible interpretation.

All right, let it be marked.

These will now be marked in the "A" sequence.

(Two statements received in evidence as A-13 and A-14.)

THE COURT: Now please seat the witness and seat the jury.

(At 4:15 p.m. the jury and the witness returned to the courtroom.)

THE COURT: The government has withdrawn its objection, the Court has directed that the exhibits be marked as A-13 and A-14.

MR. HELLMAN: Ladies and gentlemen of the jury, I am going to read you defendant Proctor's Exhibit A-13 of which I read to you a portion before, and this is the entire statement, it is now in evidence and I will read the whole thing to you.

(Continued on next page)

1963.

"I, Charles Edward Zeber, Jr., hereby make the following statement to Edward J. Putz and Maurice E. Murphy, who have identified themselves as special agents of the Federal Bureau of Investigation. This statement is made freely and voluntarily. Special Agent Putz has advised me that I do not have to say anything or answer any questions, and that anything I do say can be used against me in a court of law and that I have the right to talk with a lawyer of my own choice, or anyone else, before saying anything at all.

"No threats or promises or force have been used to get me to make this statement.

"I hereby waive my right to presence of a lawyer, in connection this interview and statement.

"I was born November 9, 1942 at Brooklyn, New York. I completed eleven years of school.

"I am a very close friend of Lee Harvey Oswald. [illegible]

summer of 1965 I met John Cordero, James Smith, Tony Polisi, owner of the Aqueduct Motel and his son Salvatore Polisi.

"A few days before July 7, 1965 Parks asked me to go on a bank job. He said the job was set up by good people. On the night of July 6th, 1965 I with Parks and Salvatore Polisi went to the Towers Apartments on Queens Boulevard where Parks and Sal stole a new red Pontiac. We drove the car to the Aqueduct Motel where the car was parked in the motel lot. We went into the bar had a drink and Parks then went and talked to Tony. During the same night James Smith told me that Tony was the boss and was setting up the bank robbery.

"On July 7, 1965 I went to the Aqueduct where I met Parks, Smith, who was living there, Sal and Tony. I drove the stolen car from the motel with Sal. Smith and John Cordero went with Parks in his car. I followed Parks to where he parked his car a couple of blocks from the bank. Parks, John and Smith got into the stolen car and all five of us drove to the motel

Queens Saving and Loan Association, 97-04 Junction Boulevard, Queens.

"I parked the car on the side street at the bank. Someone went into the bank to see if it was okay. Parks, Smith and Cordero then went into the bank and held it up. I stayed in the stolen car and Sal Polisi stood on the corner near the bank. After the robbery everyone got into the car and I drove off to where Parks had his car. Parks and Sal took the money and guns and got into Parks' Ford. I drove the stolen car a few blocks and myself, Smith, Cordero left the car. We then took a cab to the Aqueductibbel and all of us met in a room. Tony Polisi was also in the room. Parks opened the cash boxes which contained only government savings bonds and bank checks. There was no money in the boxes. Tony Polisi told Parks to destroy the bonds and checks. Parks told me later he threw the bonds and checks into a river from a drawbridge.

"On the morning of July 7th,

I [illegible] the postal [illegible]

let me go pick up the guns from them. He later came back from the hotel with two or three pistols. I have read the above statement consisting of this page and three others and I have initialed each page and each correction and it is true and correct to the best of my knowledge.

"Signed Charles E. Baker, Jr.

"Witnessed Edward J. Fitz, Special Agent, FBI, New York, N.Y., October 11, 1965. Maurice E. Murphy, Special Agent, FBI, New York, October 11, 1965."

MR. MEHLMAN: (Continuing to read): It that same day, this is Government Exhibit A-14 in evidence, New York, New York, October 11th, 1965:

"I Charles Edward Baker, Jr. hereby make the following statement freely and voluntarily to Edward J. Fitz and Maurice E. Murphy, who have identified themselves as special agents of the Federal Bureau of Investigation. Special Agent Fitz has advised me that I do not have to say anything or answer any questions and that

[illegible]

a court and that I have the right to talk to a lawyer of my own choice, or anyone else before saying anything at all. I hereby waive my right to presence of a lawyer Mr. Hanna during this interview.

"No threats or promises or force have been used to get me to make this statement.

"I was born November 9, 1942 at Brooklyn, New York and completed eleven years of school.

"I am a close friend of Richard Perks - through Perks during the summer of 1965 I met John Cordero, James Smith, Tony Polisi owner of the Aqueduct Motel and his son Salvatore Polisi.

"A few days prior to July 13th, 1965 Perks asked me to go along on a bank robbery.

"On July 12th, 1965 myself, Perks, John, Smith and Sal Polisi went to the area of 98th Street and Rockaway Boulevard, Queens. I went to a gas station and stole a 1961 Black Buick. I drove

and drove to the parking lot of the Aqueduct Motel. All of us then went into the motel bar and had a few drinks. Tony Polisi came into the bar later.

"On the day Parks talked to me about this I did probably be told me that Tony Polisi set up this job.

"On the morning of July 13th, 1965 I met Parks, Smith, Condoro and Sal Polisi at the motel. The time was about 7:30 a.m. Parks went up to see Tony Polisi in his room at the motel and picked up two or three guns from Tony. Parks picked up a .38 caliber long barrel revolver, .22 caliber revolver in a black attache case.

"I drove the stolen car from the motel lot with Sal Polisi. I followed Parks, Smith and Condoro who were in Parks' Ford to the area of the Jamaica Savings Bank, 87-10 Queens Boulevard, Queens, New York. Parks parked his 1958 Ford sedan white and blue and I drove to the bank. On the way to the bank Parks opened the attache case and handed the guns out to [illegible]

had a double barrel Remington. I parked near the bank on Queens Boulevard.. Parks, Smith and Cordero went into the bank. Sal and I stayed in the stolen car. After the robbery Parks, Smith and Cordero got back into the car. I drove east on Queens Boulevard and parked the car near a subway. All of us took the train, we all got off at different stops. Sal and Parks had the money and guns. We all then met in a room at the Aqueduct Motel. Parks and Cordero split the money. Parks first took a cut from the top for Tony Polisi and set it aside. Tony Polisi came into the room while the rest of the money was being split. I got about $2,000 as my share.

"All of us talked about the bank robbery while Tony Polisi was in the room. Later Parks told me to give the guns back to Tony Polisi.

"About a week or so later Parks told me that Tony Polisi was going to have me killed because I talked to anyone about the bank robbery./

"On Friday October 1st,

1965 I heard that Parks and Smith had been arrested; that evening I went with Regina Parks to see Tony Polizzi at the Aquaduct Motel in order to get bail for Parks. Tony gave me $200 for Parks. I gave the money to Regina. Tony told me not to come back again. He said that the FBI is still watching the motel and that he had to check out a lot of things from the motel.

"I have read the above statement consisting of this page and three others and I have initialed each page and each correction and it is true and correct to the best of my knowledge.

"Signed Charles E. Lahr, Jr.

"Witnesses E. J. Fuhr, Special Agent, FBI, October 11, 1965, New York City. Eunice E. Murphy, Special Agent, FBI, New York City, October 11, 1965."

Thank you, sir. I have no further questions.

A-13 refers to the Central Queens Savings Bank.

THE COURT: Didn't we get copies of this?

They were submitted under the Government's Exhibit numbers originally, weren't they?

MR. GILLEN: Yes, sir.

THE COURT: Would you give me the exhibits.

MR. GILLEN: Do you have them, Mr. Edelbaum?

MR. EDELBAUM: What are you looking for?

MR. GILLEN: The statements of Maher, A-13 and A-14.

MR. EDELBAUM: If you will just give me a chance.

MR. GILLEN: Oh, we have them.

MR. EDELBAUM: We wouldn't have them.

MR. GILLEN: We have them.

MR. EDELBAUM: We wouldn't have the originals, we gave them back to you.

MR. GILLEN: Here they are, here

are the statements, your Honor.

Do you want me to continue, your Honor?

THE COURT: No, I just want to see where the inconsistencies are.

There must be a showing that he would normally have disclosed the meeting.

MR. GILLEN: I would say that, your Honor, except for the fact of Mr. Edelbaum's statement at page 1516.

MR. BRILL: What page?

MR. GILLEN: 1516.

The Court asked the question:

"Why should the whole statement go in?

"MR. EDELBAUM: I think the whole statement -- this is a signed statement. The jury is entitled to have the whole picture here on this man, whether this whole story is concocted, whether it is contradictory, and I might point out to your Honor that at the Polisi trial the copy that was given to me by the Government, the photostat, showed it was in evidence

at the Polisi trial."

I think that Mr. Edelbaum has pointed out that the lack of any mention of these defendants here in those statements is an indicia that this story he now tells this jury in this trial is concocted.

Mr. Edelbaum does retreat from this position a little later on in the record, but I will leave that up to him to point it out, but I say at this page when he makes this statement he is alleging an inconsistency between this witness' testimony on this trial and those signed statements that he gave back in the October dates.

I have additional matter, your Honor.

THE COURT: On this same inconsistency, you say?

MR. GILLEN: Well, on Mr. Brown's cross examination and on Mr. Vitello's cross examination.

Now, I might say this this morning, your Honor, as this testimony unfolds here we have a conspiracy and in the indictment

July 11, 1965, who was the boss?

A Mr. Francese.

MR. MELNUM: Objected to.

THE COURT: The objection is overruled.

Excuse me, you said, "When you [illegible] on July 11th"--

MR. GILLEN: I am sorry, October 11, 1965.

Q (Continuing) Who was the boss of this operation, these bank robberies?

A Mr. Francese.

Q And who was the boss to your knowledge on October 11, 1965 of the bank robberies that took place on July 7th and July 19th, 1965?

MR. MELNUM: That is objected to.

THE COURT: Overruled, I will allow it.

MR. JAFFE: Objection--

A Mr. Franzese.

Q Now, sir, as regards Mr. Francese, were you ever asked any questions by any FBI agents or any government official on the date you were arrested pertaining to Mr. Francese?

MR. MELNUM: That is objected to.

I would like to argue a motion.

THE COURT: The jury is excused.

Will you step down, Mr. Zaher.

(Thereupon the jury and the witness left the courtroom.)

MR. GILLEN: May it please, I respectfully move for the withdrawal of a juror and a declaration of a mistrial upon the ground that by the very nature of the question it implies that on October 11, 1965 the government had an interest in Mr. Frenzese, and it implies that the government felt that Mr. Frenzese was involved in these cases, and it may also imply that he had some criminal background, and that by the very nature of the question.

THE COURT: What would the answer to the questions be?

MR. GILLEN: The answer would be yes, your Honor, for this reason.

On the bank robbery that occurred on August 19th, 1965, the car that was used in that bank robbery was stolen from the New Motor Inn in Queens, New York.

Mr. Mr. Frenzese is alleged

to have an interest in that New Motor Inn.

Now, when it was determined that the car was stolen from the New Motor Inn, interest developed in Mr. Francese so far as just the location [illegible] where the car was taken. But on the question was just asked, "Do you know Mr. Francese, did he ever have anything to do with this," all because of the disappearance of that car which was used in that robbery.

The evidence will also show during this trial with Mr. Cordero, Mr. Parks, that Mr. Francese called both of these individuals to him after that August 13th job and wanted to hear about them, Why did you steal a car from one of my places, are you crazy? You have got the Feds down all over the place on us.

Now, this was unknown to us back in October 11th, but this man was asked about Mr. Francese at that date but only because of the car, not because the government had any knowledge that he was involved in any bank robberies.

THE COURT: What is the purpose

U.S. COURT REPORTERS

of this questioning on redirect for?

MR. GILLEN: Again, your Honor, we have the broad issue that Mr. Edelbaum brought up.

[illegible]

understand the need to explain why he called Mr. Francese the boss.

MR. GILLEN: But, your Honor, your Honor also asked if any of these individuals were asked directly as to the omissions on the statements, were you asked about a certain individual, and if the answer was yes, I was asked, but I didn't tell them, then the next question is why?

THE COURT: No, no. You misunderstood.

MR. GILLEN: On the other hand, you said if you were asked or you were not asked and you didn't tell, then that is as far as you could go.

THE COURT: No. We first have to start off with an apparent inconsistency between the testimony he gave on direct or

Your Honor is allowing collateral matters to go to the jury.

THE COURT: Overruled.

BY MR. GILLER:

Q Did you know a guard by the name of Gucci?

A Yes.

Q Was he assigned to the West Street House of Detention?

MR. EDELBAUM: Same objection.

A Yes, he was.

THE COURT: Overruled. I will allow it.

Q Some time prior to Christmas, 1965, between that time and the time you were originally arrested, I think you said it was October 5th, you ever have any conversations with Mr. Gucci?

A Yes, I did.

MR. EDELBAUM: Objected to.

THE COURT: Overruled. I will allow it.

Q Can you tell us please, to the best of your recollection, when these conversations took place.

A I believe it took place right after I went in the Grand Jury against Mr. Follsi. Mr. Gucci told me---

MR. BROWN: The question was when these conversations took place?

THE COURT: Overruled. I will allow it.

A (Continuing) Mr. Gucci said, "Sonny, Mr. Francese

knows you are going against Mr. Polisi. That is o.k. But if you go any further, you are dead."

Q Did you have any conversations with Mr. James Smith pertaining to this?

MR. EDELBAUM: Objected to.

THE COURT: Overruled.

A Yes.

Q What did you tell Mr. Smith?

MR. EDELBAUM: Objection.

THE COURT: Overruled.

A I told Mr. Smith what Mr. Gucci told me.

Q Now, did there come a time when your arms were slashed?

A Yes.

Q Was that a false attempt at suicide on your part?

MR. JAFFE: Objection.

THE COURT: Overruled. I will allow it.

A Yes, it was.

Q Now can you tell us please, why did you attempt this false suicide?

MR. EDELBAUM: Objected to.

THE COURT: Overruled. I will allow it.

A I was scared. I didn't want to testify in any trials. Didn't want to testify against Polisi or anybody else?

MR. GILLEN: Objection, Your Honor.

THE COURT: Overruled. I will allow it.

A Yes, I asked him to.

Q Can you tell us when that was?

A I don't recall.

Q Well, give us your best--

A It was after the [illegible] with the off

Q How long after.

A Could have been a couple of days. Could have been a week. I don't recall.

Q And it was at a time when Mr. Cordero had been taken out of maximum security?

A Yes.

Q Now, can you tell this jury, can you give us your best estimate of how long Mr. Cordero was kept in maximum security before he joined you in the dormitory?

A Three weeks, maybe.

Q What?

A Maybe three weeks.

Q Three weeks?

A That is--I am just taking that out of a hat.

Q Three weeks after you were arrested; is that what you are fixing the time---

A I am not fixing. You are asking me a question.

Q I am trying to get your best recollection.

MR. GILLEN: I don't think I even took any notes at the time, your Honor, because those individuals, at the time, were telling us all kinds of things in West Street, and it was really more in the nature of just talking and letting the breeze all out, because we had a specific purpose in mind at that time and that wasn't it.

THE COURT: All right, the Government represents that it has no 3500 statements concerning the testimony that this witness gave on redirect examination other than what they have already received.

MR. REHMAUM: Very well, your Honor.

MR. JAFFE: May we have, Judge, the reports or any material with respect to the abortive and fake suicide that the witness described? We have testimony that the artery --

THE COURT: I think they are already in here 3500 statements.

MR. GILLEN: I think he is referring

Q It was one of the hospitals in New York City?

A Yes.

Q Where you had to be treated?

A Yes.

Q And after you recovered, then you went ahead and you did testify at Mr. Polisi's trial, I understand; am I correct in that?

A Well, I tried very much to go-- to bug out after I--

MR. EDELBAUM: I move to strike it out.

THE COURT: Strike it out as not responsive.

MR. EDELBAUM: I ask your Honor to instruct the jury to disregard it.

THE COURT: Please disregard the answer.

BY MR. BROWN:

Q Would you try to answer the question if you can, if you can't I will accept your inability to do so.

I say eventually you did testify?

A Yes, I did.

Q That was the question.

Now, you also talked about a half smile of

Reitund-cross

A That's correct.

MR. GAFFE: No further questions.

MR. VITELLO: No questions.

THE COURT: Any redirect?

MR. GILLEN: Just one.

REDIRECT EXAMINATION

BY MR. GILLEN:

Q On those conversations with Mr. Cordero when he was first arrested, did you have any conversations with him pertaining to any of these other defendants —

MR. [illegible]: I object.

MR. VITELLO: I object.

THE COURT: The jury may be excused.

(Whereupon, the jury retired from the court-room.)

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(Continued on next page.)

MR. [illegible]: May the witness be excused?

THE COURT: Yes, the witness may be excused.

(At this point, the witness retired from the courtroom.)

THE COURT: What is the last question by Mr. Gribben?

(The court reporter repeated the question as above recorded.)

MR. [illegible]: The question wasn't completed before there was [illegible].

MR. [illegible]: May it please your Honor, I respectfully move in view of that question, for the withdrawal of the juror and a mistrial.

MR. [illegible]: I join in that.

MR. [illegible]: I join in it too.

THE COURT: Motion denied.

I discount the theory of the defendants that none of their accomplices ever mentioned any of these defendants to anyone until after the [illegible] trial.

MR. [illegible]: Did I ever ask that question of this witness?

THE COURT: I don't know that you did.

MR. EDELBAUM: You don't know that I did not.

THE COURT: I will go to the record, because I thought someone asked the question

MR. EDELBAUM: Of this witness?

THE COURT: Of this witness.

MR. EDELBAUM: I never did. My questions took about four minutes. Can we have it read back again completely?

MR. MILL: And Mr. Jaffe referred only in his questions to Mr. Peters.

THE COURT: May I have the questions by Mr. Edelbaum. Will you give me just the questions. You don't have to give me the answers.

(At this point, the Court reporter repeated all of the questions asked by Mr. Edelbaum.)

THE COURT: No one else asked any questions except Mr. Jaffe. May I have Mr. Jaffe's questions.

THE REPORTER: Just the questions?

THE COURT: Yes, just the questions.

(At this point, the Court reporter repeated Mr. Jaffe's questions as above

recorded.)

THE COURT: That is it. Now under what theory do you say you can offer this?

MR. GILLEN: Well, Your Honor, I had thought there was something in the record here -- I may be having Mr. Blakewise mixed up with Mr. Helfand in many respects. Again, I think the jury should get the whole truth from this witness on the whole case. Now, I don't know what information -- I honestly don't know what information Mr. Helfand has.

THE COURT: I have a legal theory. I heard some of the lawyers talk about information given in these statements was consistent --

MR. GILLEN: Prior consistent statements.

THE COURT: (Continuing) -- when there was no occasion for fabrication.

MR. GILLEN: Well, we have here, we do have a very strong issue raised by counsel that there is fabrication on the part of these individuals, all of them -- Mr. Cadden, Mr. Parlen, Mr. Lilly, and Mr. Fuller, and specifically here Mr. Cadden added their clients as defendants

In order to(1) get a better break from the government on sentence; (2) the allegation that they are bribe witnesses and very strong allegations are their inconsistencies. And this is a prior consistent statement.

THE COURT: Consistent?

MR. GILLEN: I would say it is consistent. I don't know the whole context, but this witness will tell us that---

MR. [illegible]: I thought you said you didn't know the whole context?

MR. GILLEN: Do I have to stand and argue with this man, Your Honor?

THE COURT: Mr. Adelbaum did the very same thing to my questions.

MR. GILLEN: Yes. I don't know the answers, what was said to Mr. Cordero or to Mr. Helfand by Mr. Cordero, but I do understand that it does have---where there are names, or at least the name of one of these defendants mentioned to Mr. Helfand at the time of his first interview with Mr. Cordero. I believe that name is Mr. Francese. I don't know whether the others are mentioned, and I don't know the full story of just exactly

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U.S. COURT REPORTERS
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what was said.

I might say this too, up until today, I didn't know, didn't get into this too deeply with Mr. Helfand. I respected his client-attorney privilege, and I respected the attorney's right to protect his client. I have too much respect for the law to go into it. Until that privilege was waived, I didn't speak to Mr. Helfand about this at all. So if there is some feeling on the part of any of the defense counsel that there was something amiss, that is the reason I didn't go into all these things between client and attorney.

THE COURT: I will take it outside the hearing of the jury.

MR. BROWN: I don't think it is as simple as that, Your Honor.

MR. BELDOCK: It is a quarter after five.

THE COURT: We are going to get through with Mr. Helfand. We are not going to punish him.

MR. BELDOCK: I have no intention of punishing anybody, Judge.

(At this point, the witness was returned to the courtroom.)

THE COURT: Mr. Helfand, Mr. Gillen asked you a question. Do you remember the question?

THE WITNESS: Did I have any other conversation with Mr. Cordero about any of the defendants. The answer is "Yes."

Q And what was this conversation?

MR. BROWN: May we have when this was?

THE COURT: Yes, may we have when.

THE WITNESS: The first time I saw him in Federal Prison in New York, which would be in October, 1965. He said he wished to cooperate and talk, and he said that he would involve Sonny Franzese.

Q Was there any other statements made at that time?

A He said he wanted me to arrange to have the F.B.I. men come to speak to him and would I do that. I said I would. He did make one other statement. He said something about Mr. Franzese being involved in the disposing of money orders that had been taken in the bank robberies. That was all we discussed.

MR. MITCHELL: Your Honor, I think I got the date of these conversations, and that

is apparently the most important part here.

THE COURT: The first time you saw Mr. Cordero at West Street.

MR. VITILLO: The beginning of October.

THE WITNESS: Yes.

MR. BROWN: That wouldn't be the beginning.

THE WITNESS: Middle of October.

MR. GILLEN: He was arrested October 1st. How long did you see him after his arrest? Would this help you to refresh your recollection? He had assigned counsel, Mr. Rudy DiBiasi, for some period of time.

THE WITNESS: Right. I don't know how long that was.

MR. GILLEN: I don't know either.

THE COURT: Well, because of the last statements, I am going to sustain the objection.

MR. GILLEN: Yes, sir.

THE COURT: It may not be at a time when there was a reason not to fabricate.

There was another ground I didn't want to state before, and that was it may very well be on redirect when we talk about the interest of justice that we hear so much about and I am reluctant to rule on the procedure, but this is improper cross.

Do you have anything further to ask this witness?

MR. GILLEN: No, sir.

THE COURT: Does anybody else have anything?

MR. EDELBAUM: I don't have anything.

MR. VITELLO: No questions.

MR. BROWN: No, sir.

MR. JAYE: No.

MR. BRILL: No, sir.

THE COURT: I will excuse you in the presence of the jury, and I will excuse them.

(At this point the jury was returned to the Courtroom.)

THE COURT: For the jury, do you have any further questions?

MR. GILLEN: No, sir.

THE COURT: Do any of the defense counsel have any questions?

MR. EDELBAUM: No, sir.

James Smith

MR. GILLEN: Then I have no objection.

THE COURT: Received.

THE CLERK: A-9 in evidence.

(Defendant Franzese's Exhibit A-9 for identification received in evidence.)

MR. EDELBAUM: May I read it to the jury?

THE COURT: Surely.

MR. EDELBAUM: (Reading):

"Saturday, 5/21/66. Assistant United States Attorney Gillen.

Dangerora is out."

Out is underlined and with an exclamation point after the sentence.

"No matter how much these people want to do for us, it is still not good. Myself and Mr. James Smith want to be sent to anyplace where we can go into prison population. We don't need any advance notice. We are all packed and ready to go.

The other two guys on the case are willing to stay here because of the visits.

There is going to be trouble, and

can return to where I was. If the United States Marshalls only want to take me to the hospital one time, please have the F.B.I. take me from there on in. It will only be four days, whatever that is. That date is about June 28.

As for where to send us, maybe Tallahassee, Florida, or someplace where it is warm, relaxing, and quiet. That place Milan might present a problem and it is too cold. We want to get our health back, Mike, and our minds."

Minds underlined.

"We need to be sent on vacation. Also keep in mind you can't keep us here. Things are only going to get worse, and we don't have to be subjected to this type of unnecessary pressure.

We got five months to go and believe this we are not staying here with these two and the other elements that are present here.

Don't bother to write up and see

[illegible]. It is only a waste of time, just [illegible] us.

[illegible] I told the Marshalls that back at [illegible] to tell Chief Marshall Ward [illegible] about it. Make sure it [illegible].

[illegible] building that is [illegible]. Seems good place and make a move very soon. Thank you.

Respectfully, Richard Parks, Jones Smith"

MR. ZELLER:

Q Then you and Mr. Parks sent this letter to Mr. Gillis and you told Mr. Gillis that in the letter that you didn't like it, who were you talking about?

A I never made that statement.

THE WITNESS: I would say numerous times.

Q. What?

A. I would say numerous occasions.

Q. Numerous. How numerous?

A. I don't know.

Q. Well, give me a figure if you can.

A. Well, say fifteen. Do you want that?

MR. EDELBAUM: No, I don't want it. I want the fact.

THE COURT: Give us an approximation. You may not be able to tell us the exact number, but you may be able to tell us whether it was five or fifty or about five or fifty. You are saying about fifteen times. Are you just picking a number?

THE WITNESS: I don't recall. This is going back ten months.

THE COURT: It is very difficult to fix the number?

THE WITNESS: Sure.

MR. EDELBAUM: I am satisfied.

THE WITNESS: Because I don't have any concept of time.

MR. EDELBAUM: He has given me enough. I don't require any more. I appreciate

BY MR. EDELSTEIN:

Q. Now, tell me how many times have you seen agents of the F.B.I. and told them all about your activities in the various bank robberies up until the Polisi trial?

A. Maybe eight; maybe ten times.

Q. Now, to your knowledge, is it a fact that Cordero didn't testify at ten Polisi trial?

A. No, he didn't.

Q. Did Cordero ever tell you that he was worried that because he wasn't called as a witness at the Polisi trial he didn't get the same consideration from the Judge who had sentenced him as you, Faber and Paris?

A. He might have mentioned it.

Q. Now, when for the first time -- when, is the question did you ever tell any Government official about Mr. Franzese?

A. When?

Q. Yes, when? And use the Polisi trial as a target date. Before? After?

A. I am just guessing, but I would say it was after the Polisi trial.

Q. How long?

A. I don't know. Possibly a month after.

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Q [illegible]

MR. EDELBAUM: Question withdrawn.

Q Do you know who told any government official first about it a week ago, Parisi, Feller and Gallico?

A No, I don't.

Q How about a month after the Polizzi affair, who did you tell Gallico's name to?

A I believe Mr. Gillen.

Q Did you tell him first or did he ask you about Mr. Gallico?

A He asked me.

MR. EDELBAUM: Just a moment, your Honor.

May I have a moment?

THE COURT: Yes.

(Discussion between Mr. Edelbaum and Mr. Feitell out of the hearing of the reporter.)

Q Mr. Smith, you have told this jury that on a number of occasions you went into different banks armed with a loaded gun, and you have told us that if the occasion should arise you would not have hesitated to use that gun to [illegible]

A I believe I would not.

signature, but you were unaware of it?

A That is right. When he wrote the l[illegible] told me that the letter was going to be about con[illegible] in the jail and the fact that our security there wasn't any good, and that we wanted to leave.

And I says, "You write it and I will sign it."

Q Now, did you ever become aware of the fact that Mr. Ferris told Mr. Gillen in letter form, over your signature, that he told Mr. Gillen that you forced [illegible] and Jimmy into this case?

Did you ever become aware of that?

A Later on.

Q You did?

A Yes.

Q Now, how long after the date of the letter, and it is right there before you for your reference, did you become aware that this had been said to Mr. Gillen that you forced me and Jimmy into this case?

A Possibly a few weeks after.

Q What is the date of that letter, Mr. Smith, if you would help me with that?

A 5/21/66.

Q 5/21/66?

Iskowitz- Direct

THE COURT: That's as I understand it. And if it's intended to go any further, I would have to refer back to the actual waiver.

MR. GILLEN: I believe it's just limited, your Honor.

THE COURT: All right. If you understand it that way, if you ask questions that go beyond it, then you assert the privilege and then we will ask for Mr. Parks' further examination.-

THE WITNESS: Very well.

THE COURT:(Continuing) -- of the other matters.

Q. Did Mr. Parks direct you also to a Mr. Anthony Polisi?

A. Yes.

Q. What did he tell you, Mr. Iskowitz?

A. May I look at my notes?

Q. Certainly.

A. Mr. Parks told me that he loaned Tony Polisi $1,000; that Mr. Polisi was paying him back this money at the rate of $200 a month; that he had made one payment; that there was a balance of $800 still owing by Mr. Polisi to Mr. Parks; and he asked me to call Mr. Polisi and ask for the $800.

Q. Did you call Mr. Polisi?

A. I did.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

-against- :

THOMAS MATTIO, : 64 CR 460

Defendant. :

- x

United States Courthouse
Brooklyn, New York

June 13, 1968
10:00 o'clock A.M.

B e f o r e:

HONORABLE JOHN F. DOOLING, JR., U. S. D. J.

* * * *

GENE RUDOLPH
OFFICIAL COURT REPORTER

Attorney Gillen had said the charges have been squashed," referring to charges in the State of Colorado.

Do you recall that letter?

A May I read it?

Q Yes, sir.

A Thank you.

I remember receiving a letter from him, but I don't have any -- no independent recollection of receiving that.

Q Did you ask Assistant United States Attorney Gillen if he had said the Colorado charges have been squashed?

A I never did, no.

Q When was the first time you saw Parks?

A March 11, 1966.

Q Was that in Danbury?

A That was in Danbury, Connecticut.

Q At the Federal Prison there?

A That is correct.

Q Did you have a discussion with him?

A Among others, yes.

Q What had transpired in the discussion?

A Do you want the entire story?

Q Yes.

A Before March 11, I had received indications that

certain of these people were willing to give testimony concerning John Sonny Francis and their implication in certain bank robberies that had been committed throughout the United States and the possibility that others which were not brought to fruition out in -- western part of the United States, particularly in California and, I believe, in Oregon.

As part of this situation, the defendants desired to have a talk with me for the purpose of seeing if they could secure some promises for consideration.

I arranged with two agents of the Federal Bureau of Investigation. I believe Mr. Thatcher and Murphy, and Mr. Gillen and myself to go there on, I believe, Friday, March 11th; and we went up and saw them.

We arrived there at approximately -- after the luncheon hour, which would be around noontime or thereabouts.

I interviewed each of the four persons. That's Cordero, Parks, Zaher and Smith separately; listened to their stories, listened to what they wanted and to each of them I told that I would make no promise whatsoever for any consideration.

I believe I used the old cliche, that I would not buy a pig in a poke, that I would only determine

what information -- what consideration could be or would be recommended to a Court if they did in fact testify.

At this point I believe that each of them had already pleaded guilty to other indictments in this Court and were presently awaiting sentence.

I told each one of them individually that whatever help they gave to the government would be brought to the attention of the sentencing judge, and I don't remember whether it was to be Judge Mishler or Judge Bruchhausen that had tried the original case.

I think it involved a man by the name of Polisi. I did not inquire into any facts or circumstances concerning what testimony any of them could give.

I did get the impression from talking to each of them that they had only given, at the most, a very sketchy outline of the facts surrounding Mr. Franzese and the other persons involved, up to that time.

I made it most clear to each one of them that they would, if they cooperated, have their consideration brought to the attention of the sentencing judge.

I do remember distinctly telling them that the cooperation that they had already given concerning the Polisi would be brought to the attention of the then sentencing judge, whom I believe was either Judge Mishler

Q You began by referring to, as I recall your testimony, the witnesses said that they wanted?

A Oh, sure.

Q With respect to Danke, what did he say he wanted?

A He wanted to be put out on the street the next day, if possible.

Q Did he speak about a charge against him in Colorado?

A At that point, no.

I never spoke specifics. The only one that was in any way specific was Cordero, who was concerned about the fact that he had a wife and a daughter of his wife by her first marriage, and I think they were living some place up in Connecticut, and the fact that they were so close to the border that he thought that he would like to have greater consideration and having more visits than the ordinary prisoner.

As a matter of fact, I think she had used up all the visits in one week to which she had been entitled for a month. This is coming back to me.

Q What did you mean when you said to them that you were not going to buy a pig in the poke?

A The old expression, a pig in the poke, means that

there is a burlap bag and that it's full and that the pig is in there and you want to see whether it's good, bad or indifferent.

I wanted to know what merchandise I'm getting. I wanted to see it right out there. That was what I would bring to the Court's attention.

Q What did you intend to convey to them, that they had to testify in a certain fashion?

A No. They had to tell the truth.

Q You could have said that without stating the pig in the poke; couldn't you?

A I certainly could, but I also told them to tell the truth.

Q Have you been refreshing your recollection with something there?

A No. This is a memorandum which I dictated on the Monday following, because this was a Friday. I arrived back in the office about a quarter to seven, seven o'clock.

MR. SCHWARZ: Have you seen this?

MR. GRUNEWALD: I have a copy.

MR. SCHWARZ: Your Honor, may I just take a moment to look at this?

THE COURT: Yes.

MR. GRUNEWALD: May we have that marked as

DIRECT EXAMINATION

BY MR. SCHWARZ (Continued):

Q To your knowledge, was this document or a copy of it turned over to defense counsel in any of the cases in which this gentleman testified?

A No.

THE COURT: What? Yes or no?

THE WITNESS: No, not that I know of. That -- that copy was not. That came out of my file.

Q Well --

THE COURT: Would you know, Mr. Grunewald?

MR. GRUNEWALD: I don't believe that it was, your Honor.

THE COURT: I am sorry. I did not see you, Mr. Gillen. You would be the one who would know.

MR. GILLEN: I don't believe so, your Honor.

Q Did you have a discussion with Mr. Gillen at any time about whether the letters that had been received from Mr. Parks should be turned over to defense counsel in any case?

A Oh, yes.

Q When did that take place?

A In Albany, the Sunday night before we selected the jury in the Fromacie case, in the Federal Courthouse in Albany.

Q And at that time did you and --

A Among other times. That was the last time I had the discussion with him.

Q At that time did you and Mr. Gillen have files in connection with that matter in which contained material and you went over the material to see what needed to be turned over?

A Mr. Gillen and I discussed the fact that we would hand up the letters that we would consider that could be utilized or that -- for the Court's in camera inspection, and if the Court decided that the letters should be turned over to the defendant's attorneys, that we will turn over all the letters, even those that we believed had no relationship whatsoever.

Q Did you discuss turning over this memorandum?

A No.

Q Did you have this memorandum with you?

A I'm sure I did not.

Q Wasn't this memorandum relevant?

A Isn't it relevant?

17 Mayo - direct

MR. GRUMBACH: That's why I object to the question.

A (Continuing) This -- there is no -- there was never any relationship whatsoever to any conference that I had. To the memo.

THE COURT: That was not the question.

The question was, was there any discussion with Mr. Gillen about turning this memorandum over to counsel under Rule 3500 or to the Court or to anyone else in connection with the Mattio case or any of the other cases.

THE WITNESS: No, your Honor.

THE COURT: I take it, the answer is no?

THE WITNESS: No.

THE COURT: Just never came up?

THE WITNESS: No.

Q Did you have, prior to the Mattio case, any discussion with Mr. Gillen as to what he should turn over in that case?

A None whatsoever.

As a matter of fact, I never knew that Mattio had any connection with Parks, Usher, or anything, except, I think, the two people that were with him in the truck, or --

as I remember the case, and it's only from the brief, that dealt with rugs, I think, that was hijacked or stolen out of Connecticut. And -- I had no connection whatsoever with anything that would deal with Parks, Zaher or -- etc. -- and Mattio.

Q Did Mr. Gillen ever show you Defendant's Exhibit 4, which I now show you, which is a letter dated May 21, 1964?

A I remember seeing this letter, yes.

Q Did you discuss that with Mr. Gillen?

A Other than sending it over to him, no.

Q You sent that over to him?

A Yes.

Q After -- how did it happen that you sent it over to him?

A Because it would have been referred to me primarily. The mail is referred to me.

THE COURT: No matter whom it is addressed to?

THE WITNESS: If it is official correspondence that comes in dealing with a case.

Q So --

A These letters are referred down by the --

THE COURT: My point is, it is addressed

23 Moody - direct

2 A Ordinary --

Q -- when you read that sentence, didn't it concern you and lead you to want to find out what had been going on?

A No, because I -- we had the grand jury testimony.

THE COURT: I think that Mr. Moody means, he knew.

THE WITNESS: I knew what was going on. We knew that the case had been presented to a grand jury and developed in the grand jury. It was not developed by agents going out and securing the testimony outside or agents going -- interviewing these people.

This testimony was elicited absolutely straightforward, under oath, before twenty-three grand jurors, in the secrecy of a grand jury room.

Q Did you know that Mr. Gillen had not made any promises?

A I knew what promises were made which were, as I told you before, and those were the only promises that were made.

I have spoken to Mr. Gillen on this time and time again, prior to and during the Franzese case, that there were no promises made.

Q Did you speak to Mr. Gillen in specific

reference to those letters?

A Yes, to what -- what I said in regard to Letter A, B, and C, D, I have no independent recollection.

Q Did you meet with Parks or Zaher more than once?

A No. I told you that in the beginning. I only saw them once.

Q No, you did not. You said you met with them on that occasion.

I was finding out if you met with them more than once.

A No.

Q When you had your discussion with them, did you tell them that they would expect the best possible or maximum consideration from the Court?

A I cannot commit the Court in any way. I never told them that they would get that, any maximum consideration.

Q Did you say that you would make the maximum effort on their behalf?

A That I would go as far as they went. If they went and gave the full truth and told everything they knew, I would bring all of that and what I considered their cooperation to the attention of the Court. That's what I did.

Q If Mr. Parks stated in a letter that you had

Mr. Parks of the impression that he appeared to have in this letter?

A I spoke to Mr. Parks once in my life, which was in Danbury; so I did not talk to him again. I told Mr. Gillen to tell him that the most they could get were -- whatever cooperation they afforded to the Government would be brought to the consideration of the sentencing judge; that Mr. Gillen informed me that that's what he told them.

When, where and under what circumstances he told them that, other than in a conference in his office or in the pen downstairs, I don't know.

Q Well, specifically, after you received this letter in which Parks says you, Mr. Hoey, said I am going to get the maximum consideration, did you tell Mr. Gillen to go see Mr. Parks or go write Mr. Parks and tell him that's not correct?

A No.

Q Youdid not?

A No.

Q Do you know a gentleman called Julius Itzkowitz, who is a member of the Bar?

A I believe he was an attorney for one of the defendants. I don't know which one.

Q Did you meet --

Q You asked -- do you recall asking Mr. Gillen to check into it?

A I don't recall. I may have. I don't know. But I gave no credence to it.

Q What would it take to make you give credence to such a statement?

A The fact that if I was convinced that it did happen, but you forget that this case was developed not in the -- by investigators but this case was developed against Franzese by the Grand Jury and there all the testimony was brought forth.

Q I show you Exhibit H, which is a letter of December 2nd, from Mr. Parks to yourself.

A I have no independent recollection of receiving that, though I undoubtedly did.

Q Did you ask --

A Is that one of the letters that was turned over to the defendants?

Q Yes, it is.

A Then I must have -- I must have received it.

Q I believe so because --

A I must have received it then.

Q Did you ask Mr. Kelly whether he had told Mr. Parks' attorney that he would have certain violations

the letter whether he made any promises?

A I have no independent recollection of asking him that.

Q Well, if you had --

A I do -- go ahead.

Q Go ahead.

A I do remember that at one point, when Mr. Gillen was in the hospital and Mr. Kelly did have a meeting with -- I know he had a meeting with Mr. Itzkowitz, and I think with Mr. Helfan, who represented one of the other defendants, and I -- I don't know whether he did have with Parks or not and I do have a recollection that he discussed some time that they wanted something done about -- I presume, with the traffic.

Q Was it your decision that the sentencing of Messrs. Parks and Zaher would be postponed until after they had given testimony in the Mattio case and the Franzese case?

A Counsel, as I said before, I had no independent recollection of them ever testifying in the Mattio case until such a time as I saw the brief, and it was submitted on the testimony, I believe it was of Zaher at that time. It was my decision to recommend to the Court and request the Court to hold up the sentencing of all four defendants

until after the Franzese case was held.

I believe we made that request to successive judges before whom they appeared, and I believe that finally the sentencing of Parks, Cordero, Smith and Zaher was assigned by the Board of Judges to Judge Mishler, when we received a copy of a -- directive to the Clerk of the Court and also to the Probation Officer and to my office setting forth that Judge Mishler would do the sentencing in the case.

Q Is it the procedure of your office that in order for an Assistant U. S. Attorney to apply for the postponing of a sentencing, he must clear that through your office?

A Yes, sure. Through me personally, not necessarily. Through Mr. Kelly or the Chief of the Criminal Division, yes, whoever is in charge of the Criminal Division at that time. It could be Mr. Grunewald, who is the Deputy Chief of the Criminal Division, or my first assistant.

Q When was the last time that you asked Mr. Gillen if he had made any promises to Parks and Zaher?

MR. GRUNEWALD: Objection to the form of the question.

It's the old, "When was the last time you beat your wife?"

and the only thing I could do was to bring their cooperatio
to the Court's attention; that I couldn't presume to pass
tell them what the Court was going to do.

Q Mr. Hoey, you see a great deal of correspondenc
that goes across your desk; isn't that true, sir?

A Yes.

Q Over the years, many, many thousand and thou-
sands of pieces of correspondence; would that be fair?

A I presume so.

Q And you get them from people in all walks of
life; isn't that so?

A Yes.

Q Some are more literate, some are not, some
write them in ink, some write them in pencil, some write
them on fancy pieces of paper and some on scrap; isn't that
so, sir?

A Correct.

Q Were you aware in a broad sense of the nature
of the possibility of testimony as against a Mr. Franzese
some time in 1965 or '6?

A Not in 1965.

Q '66?

A '66, yes.

Q In a broad sense, it came to your attention; isn

AFFIDAVIT IN OPPOSITION

EXHIBIT

MEMORANDUM FOR THE FILE

On Friday, March 11, I visited the Federal Correctional Institution at Danbury, Connecticut, with AUSA Michael Gillen and Special Agents Bafford and Murphy of the FBI. We there interviewed

JOHN JOSEPH CORDERO
RICHARD PAUL PARKS
JAMES JOSEPH SMITH
CHARLES ZAHER

Each of these men has pleaded guilty to the crime of bank robbery and, with the exception of CORDERO, all of them testified against ANTHONY POLISI and SALVATORE POLISI who are presently awaiting sentence before the Hon. Walter Bruchhausen in this district.

CORDERO, PARKS, SMITH and ZAHER had indicated to Mr. Gillen and the agents of the FBI that they desired to cooperate with the Government and to testify concerning the participation of JOHN "SONNY" FRANZESE in the planning and execution of various bank robberies, and also concerning distribution of the monies received as a result of the bank robberies.

CORDERO and ZAHER would be able to testify as to direct contacts with FRANZESE in the planning of the bank robberies as well as the distribution of the monies. PARKS and SMITH would in a way be able to corroborate the testimony of the other two through conversations had with two other persons, who also would be defendants, immediately after a meeting in which FRANZESE discussed proposed robberies with CORDERO and ZAHER in a motel in Queens County.

Each of these four requested individual interviews with me and each requested a commitment as to his sentence in return for cooperation. I informed each of

them that I would make no commitment to them, that I was in no position to make any commitment and that the only thing that I would do for them would be to bring their cooperation to the attention of the sentencing judge. I further stated that each of them had cooperated and three of them had testified against POLISI father and son; that this would be brought to the attention of the sentencing judge and that if they gave any further cooperation that this likewise would be brought to the judge's attention. I stressed that it was the responsibility of the sentencing judge to impose sentence and that I would not recommend any sentence except to bring their cooperation to the judge's attention.

After the last interview I reaffirmed this to the four men together. Apparently they were satisfied with the fact that this would be brought to the judge's attention and agreed that they would testify in a Grand Jury proceeding and trial against FRANZESE and others.

It is anticipated that this matter will be presented to the Grand Jury during the week of March 21.

This information was transmitted to Mr. Hundley via telephone on Friday night, March 11.

JOSEPH P. HOEY
United States Attorney

March 14, 1966

JPH:ems

Copy to Mr. Gillen

PETITIONER'S EXHIBITS

75 C 1613

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JOHN FRANZESE, :

Petitioner, :

-against- :

UNITED STATES OF AMERICA, :

Respondent. :

----------x

CHRONOLOGY OF EVENTS

The enclosed chronology of events is presented as an aid to the Court. It is not presented as an all inclusive summary of events but does set forth those events the petitioner feels are relevant to and probative of the issues to be decided at this hearing.

July 7, 1965	Robbery
July 13, 1965	Robbery
July 14 thru 19, 1965	Smith and Parks go to Puerto Rico
July 19 thru 22, 1975	Meeting at Acqueduct Motel which is the alleged beginning of Franzese involvement in conspiracy
July 30, 1965	Robbery
Between August 5 and 7, 1965	Alleged meeting at Potere Apartment 83-16 Lefferts Boulevard, Queens, NY
August 13, 1965	Robbery
August 13, 1965	John Cordero marries Eleanor
August 30, 1965	Robbery of bank in Chicopee, Mass.
September 11 to 14, 1965	Robbery of bank in Denver, Colorado

September 15, 1965	Robbery of bank in Salt Lake City, Utah
September 27, 1965	Affidavit in support of arrest filed and warrants authorizing the arrest of James Smith, Eleanor Cordero and John Cordero for the August 13, 1965 robbery issued
September 30, 1965	James Smith, Eleanor Cordero, John Cordero and Richard Parks are arrested and lodged at the Federal House of Detention, West Street
October 7, 1965	John Cordero testifies in Grand Jury. Indictment returned charging Richard Parks, James Smith, John Cordero, Charles Zaher, Ann Masseneo, Anthony Polisi and Salvatore Polisi with bank robbery
October 8, 1965	Charles Zaher, Ann Masseneo, Anthony Polisi and Salvatore Polisi are arrested
October 14, 1965	Four witnesses are arraigned and convey intent to cooperate with authorities
November 1965	Zaher and Cordero create scenario of fear by Cordero slashing Zaher's wrist in apparent suicide attempt
November 12, 1965	Thomas Zummo arrested by the FBI for allegedly making threats against John and Eleanor Cordero
January 1966	Salvatore and Anthony Polisi are tried for bank robbery. Both are convicted
February 7, 1966	Prosecutor authorized dismissal of complaint lodged against Thomas Zummo
April 12, 1966	John Franzese indicted
April 1966 thru September 1966	Charles Zaher lodged in Federal Prison Danbury, Connecticut
Spring 1966	Charles Zaher writes letter to Thomas Matteo
June 1966	Charles Zaher appears at trial of Thomas Matteo

June 13, 1966	Jury convicts Thomas Matteo of theft from an interstate shipment
June 1966	Zaher first discusses Rupoli death with Detective Joe Price of Queens County. Zaher does not mention Matteo
June 15, 1966	Charles Zaher writes letter to his wife Ann
September 9, 1966	Franzese through his attorney, Lester Landy, move under Rule 17(c) to depose Charles E. Zaher
September 23, 1966	Charles Zaher testifies in Queens County Grand Jury which indicts Franzese and Matteo with two others, for the murder of Ernie Rupoli a/k/a The Hawk. Zaher did not mention Matteo in his Grand Jury testimony
September 26, 1966	Franzese motion to depose Charles Zaher is withdrawn by counsel
November 1966	Zaher first implicates Matteo in Rupoli case during conversation with Detective Price
January 23, 1967	Defendant Masseneo severed from the case
January 27, 1967	Anthony Polisi severed from the case
January 30, 1967	Trial commences
March 3, 1967	Jury returns verdict
September 25, 1969	Anthony Polisi conviction reversed by Second Circuit Court of Appeals

Form No. 10
CRIMINAL DOCKET

64CR 460

TITLE OF CASE

THE UNITED STATES

vs.

RICHARD PARKS, DENNIS CHARLES NEUNER, ARTHUR JAMES GONSALVES, JR., THOMAS DANIEL MATTIO and WILLIAM GEORGE WEISSBACH

PETITIONER'S EXHIBIT 2
75 C 161

ATTORNEYS

For Deft. WEISSBACH
James E. McGinniss
104-10 - 116th St.
Richmond Hill, N.Y.
MI-1-2300

For Deft. MATTIO
Nicholas A. Clemente
32 Court St. Bklyn. N.Y.
MA-5-6627

By Frederick Schwartz

ABSTRACT OF COSTS	AMOUNT		CASH DATE	CASH No.				
Fine,			3/16/66	Appeal Bond			5	—
Clerk,			3/17/66	Fee Dean				
Marshal,			3/23/66	Appearance Bond Forfeited	5	—		
Attorney,			5/24/66	Fee Dean			5	—
Commissioner's Court,								
Witnesses,								

DATE	PROCEEDINGS
12-31-64	INDICTMENT FILED.
1-14-65	Notice of Arrearance filed for defendants MATTIO & WEISSBACH
1-14-65	Before Bruchhausen J - Defendants PARKS, MATTIO & WEISSBACH and counsels present. Defendants arraigned and plea not guilty. Defendants O.R. and case placed on General Calendar. Defendants NEUNER & GONSALVES assigned to A.F.Marra by Mr Rosenkranz of Legal Aid and case as to them adjourned to 1-21-65.
1-21-65	Before Bruchhausen J - Defendants NEUNER & GONSALVES and counsel present Defendant arraigned and each having been warned of their rights and each on his own behalf enter a plea of guilty to count (1) - Defendants O.R. and sentences adjourned to 4-15-65.
4-15-65	Before Rayfiel J - Defendants NEUNER and GONSALVES present and with counsel - Imposition of sentence is suspended on count (1) and defendant

Stofsky - Nov. 1965

PROCEEDINGS

NEUNER and GONSALVES are placed on probation for a period of 3 years, pursuant to Sections 5010(a) and 5021(b) of Title 18 U.S.Code. On motion of Asst. U.S.Attorney Douglass counts 2 and 4 are dismissed as to defendants NEUNER and GONSalves.

Judgment and Order of Probation filed - Certified copies delivered to Probation Officer as to defendants NEUNER and GONSALVES.

Before Rosling J - Defendants and counsels present - Defendants O. R. and case marked Ready and Passed.

Steno's minutes of Sentence dated 4-18-65 filed (NEUNER & GONSALVES JR)

Before Rayfiel,J. Case called Defts and Deft PARKS Atty present. Case adjd to 3-31-66

Before Rayfiel J - Defendants PARKS, MATTIO and WEISSBACK present - Deft. WEISSBACK without counsel - Case adjourned to 4-7-66 as to all defts.

Before Bartels J - Defts. MATTIO & WEISSBACH present and with counsels. - Deft. PARKS not present - Case adjourned to June 1966 Term.

Notice of Appearance filed for defendant WEISSBACH

Notice of Appearance filed for d ft. MATTIO

Before Dooling J - Case called - Defts and counsels present. Defendant PARK withdraws his plea of not guilty and after being warned of his rights by the Court and oh his own behalf enters a plea of guilty to count (3) - Deft. in custody and sentence adjourned without date. - Case as to other defendan adjourned to 6-6-66

Before Dooling, J. - Case called - Trial ordered & Begun. Trial continued to June 7, 1966 at 10:00 A.M

Before Dooling J. - Case called - Trial resumed - Trial continued to June 8, 1966.

Before Dooling, J. - Case called - Trial resumed - Defts. motion to dismis Counts 1, 2 and 4 on behalf of deft. WEISSBACH - Motion denied. Defts. motion to dismiss counts 1, 2 and 4 on behalf of deft. MATTIO - Motion deni Trial continued to June 9, 1966 at 2:00 P.M.

Before Dooling, J. - Case called - Trial resumed - Trial continued to June 10, 1966 at 10:00 A.M.

Before Dooling, J. - Case called - Trial resumed - Defts. WEISSBACH & MATT motion for acquittal - denied; Defts. WEISSBACH & MATTIO motion for reductir of Indictment - Denied - Trial continued to June 13, 1966 at 9:30 AM.

Before Dooling, J. - Case called - Trial resumed - Order of sustenance signed - Jury returns a verdict of guilty as to defts. MATTIO & WEISSBACH both on counts 1, 2 and 4 - Defendants MATTIO & WEISSBACH renew motions fo

CRIMINAL DOCKET U.S.A. 100

PROCEEDINGS

Acquittal and for a new trial - Denied - Defendants continued on bail until sentence - Trial concluded - Jury Discharged - Sentence adjourned to 7-22-66

-66 By Dooling J - Order of Sustenance filed.

-66 Before Dooling, J. - Case called - Defendants and counsel present - Sentence adjourned to August 11, 1966

-66 Before Dooling, J. - Case called - Defendants and counsels present- Deft. MATTIO is sentenced to 2 years on each of counts 1, 2 & 4 - Sentences to run concurrently pursuant to Sec. 4208(a)(2) of T-18, U.S.C. Execution of sentence is stayed until Nov. 14, 1966. Deft. WEISSBACH is sentenced to 1 year and one day/imprisonment on each of counts 1, 2 & 4. Sentences to run concurrently under Sec. 4208(a)(2) of T-18, U.S.C.

11-66 Judgment and Commitments filed as to both defts. Certified copies to Marshal. (Mattio & Weissbach)

6-66 Notice of Appeal filed. (MATTIO)

6-66 Statement of Docket Entries and duplicate copy of Notice of Appeal mailed to Court of Appeals.(MATTIO)

22-66 Notice of Appeal filed (WEISSBACH)

22-66 Statement of Docket Entries and duplicate copy of Notice of Appeal mailed to Court of Appeals.(WEISSBACH)

1-14-66 Before Dooling, J. - Case called - No answer (MATTIO)

-21-66 Stenographers transcript dated June 6, 1966, filed.

1-21-66 Stenographers transcript dated June 8, 1966, filed.

1-21-66 Stenographers transcript dated June 9, 1966, filed.

1-21-66 Stenographers transcript dated June 10, 1966, filed.

1-21-66 Stenographers transcript dated Aug. 11, 1966, filed.

1-22-66 Certified copy of Record on Appeal mailed to Court of Appeals. (MATTIO-WEISSBA

-25-66 Copy of index on appeal recd from C.of A. acknowledging record on on appeal filed as to deft Weissbach & MATTIO.

-6-67 Before Bruchhausen, J. - Case called - Deft. WEISSBACH surrenders to U.S. Marshal.

-9-67 Certified copy of Stipulation filed discontinuing and dismissing appeal. (WEISSBACH).

2-14-67 Certified copy of Judgment & Commitment returned and filed as to deft. Weissbach. Deft. del. to F.C.I., Danbury, Conn.

2-23-67 Letter received from Chambers of Judge Dooling dated Feb. 10, 1967 and considered as a motion for reduction of sentence, etc. filed.

2-23-67 By Dooling, J. - Order filed, ORDERED that motion is denied for reducti of sentence, etc. (p/c mailed) Copy mailed to deft.

D. C. 109

PROCEEDINGS

Before Mishler, J. - Case called - Deft. Parks & Counsel present-
Imposition of sentence is suspended and defendant is placed on probation
for 5 years on count 2. Sentences to run concurrently with sentences
imposed under 66CR-161, 66CR-306 and 66CR-308. On motion of Asst. U.S.
Attorney Gillen, counts 1, 2 & 4 are dismissed.

67 Judgment & Order of Probation filed. Certified copies to Probation.

-67 Notice of Motion filed for bail pending appeal (Mattio) (6-28-67)

8-67 Before Dooling, J. - Hearing on motion for an order staying the execution
of a judgment of conviction, etc. Hearing held & concluded. Deft. MATTIO
to put up unsecured personal bond of $10,000.00 as indicated by the Court
Unsecured Bond and bond on appeal filed. AO-199 Bail Reform Act.Form #2)

7 Bail Reform Act Form #2 filed. (Order specifying methods and conditions
of release.) MATTIO

67 Supplemental Record on Appeal mailed to Court of Appeals.

7 Acknowledgement received from Court of Appeals for Supplemental Record
on Appeal

67 Certified copy of Order received from court of Appeals, filed . Represent
having been made to this Court indicating that a hearing could well be in
stituted relative to the need of appellant to proceed in the within appeal
in forma pauperis and to have counsel, pursuant to the Criminal Justice Ac
assigned to prosecute the Appeal, IT IS ORDERED THAT the U. S. District
Court for the Eastern District of New York hold a hearing in these premise
and report its findings to this Court. (THOMAS MATTIO)

8-67 Before Mishler, J. - Case called - Deft. & counsel present. Criminal hear
held on whether deft. is eligible to continue the assignment of counsel
under the Criminal Justice Act - Hearing Held - Hearing concluded. Court
found that the deft. is eligible under the Criminal Justice Act. Court
will enter an order. (MATTIO)

-67 By Mishler, J. - Memorandum filed that 1. Deft.-Appellant is without fun
of property of any kind whatsoever etc. Conclusion: Deft.-Appellant is
financially unable to prosecute the appeal now pending in the above proce
ings. Clerk of this court is directed to file this report and transmit
same to the Clerk of the U.S. Court of Appeals for the Second Circuit.

3-67 Original of Memo of Judge Mishler forwarded to U.S. Court of Appeals
as instructed, in connection with appeal now pending by order dated
Sept. 20, 1967. (MATTIO)

-67 By Rayfiel, J. - Order of discharge from Probation filed. (NEUNER)

-67 By Rayfiel, J. - Certificate of Vacation of Conviction filed. (NEUNER)

PROCEEDINGS

8	By Rayfiel, J. - Order of Discharge from Probation filed. (GONSALVES, JR.)
8	By Rayfiel, J. - Certificate of Vacation of Conviction filed.(GONSALVES)
8	Certified copy of Judgment and copy of Opinion received from Court of Appeals affirming the Judgment of this Court filed. (MATTIO)
8	Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit it is ordered by the Supreme Court of the U.S., petition is denied. (as to deft. MATTIO)
-68	Before Dooling, J. - As per instructions of Judge Dooling surrender adjd. to May 17, 1968 at 10:00 A.M. (MATTIO)
-68	Order to Show Cause filed for new trial or for reduction of sentence as to deft. MATTIO.
-68	Before Dooling, J. - Case called. Deft. & his counsel Mr. Schwarz present. Hearing on order for new trial or for reduction of sentence. Held and concluded. Court reserved decision. Govt. to submit an affidavit in opposition on or before May 24, 1968. Court stayed the execution of sentence for a period of two weeks, until May 31, 1968 and deft. continued on same bail at the time of arraignment for a period of 2 weeks until May 31, 1968.
-68	Governments affidavit & Memo of Law filed in opposition to defts. MATTIO motion for a new trial, etc.
9-68	Reply memorandum in Support of Motion for a New Trial Filed.
9-68	Supplemental Affidavit filed.
1-68	Before Dooling J - Case called - Deft. THOMAS D. [illegible] Frederick Schwartz present - Hearing on defts motion for a new trial begun and adjourned without date. Execution of sentence is stayed to June 28, 1968 or the earlier date on which the motion is decided. Bail continued.
4-68	Petition for Writs of Habeas Corpus Ad Testificandum For PARKS & ZAMER filed
4-68	By Rosling J - Writs Issued as to PARKS AND ZAMER.
1-68	Writ returned and filed. Executed as to ZAMER.
3-68	Before Dooling, J. - Case called for hearing on deft. Mattio motion for a new trial. Hearing ordered and begun. Deft. Mattio and counsel present. Hearing continued to June 14, 1968.
4-68	Before Dooling, J. - Case called, Hearing continued, Deft. MATTIO and counsel present. Hearing concluded. Both sides may submit briefs. Decision Reserved. (cm)

C. 109

PROCEEDINGS

By Dooling, Jr. - Memorandum & Order filed on deft. Mattio motionto reduce sentence, etc. Motion for reduction of sentence as to deft. MATTIO is denied.(p/c mailed)

By Dooling, J. - Memorandum (Incorporated findings of Fact and Order) filed, Denying deft. MATTIO motion for a new trial. (p/c mailed)

Before Zavatt, Ch. Case called for surrender of deft. MATTIO. Deft. & counsel Mr. Schwarz present. Deft. surrendered to the U.S. Marshal.

Letter from deft. MATTIO dated June 30, 1968, treating as a motion for reargument, etc. filed.

By Dooling, J. - Order filed denying deft. MATTIO motion for re-argument of reduction of sentence etc.

By Zavatt, Ch. J. - Order filed denying atty. Schwartz, Oral motion for deft. MATTIO to be released in the custody of a U.S. Marshal in order to marry one Miss Smith. (p/c mailed)

Letter from deft. , dated July 25, 1968, received from Chambers of Judge Dooling, and filed. (considered as an application for reduction of sentence.)

By Dooling, J. - Order filed denying deft. MATTIO application for a reduction of sentence, etc.(copy mailed to deft.)

Letter dated Oct. 25, 1968, from attorney for deft. MATTIO, received from Chambers of Ch.Judge Zavatt, filed.

Stenographers transcript dated June 13, 1968 filed.(Mattio)

Stofsky - Nov. 7 - 1968

EX 3

3 - HANDWRITTEN LETTER

503a

Dear Tom

I hope by now you got some
sense and listen to Ann. Richie is going
to testify against you, and I'm sorry
to. You're just one of those
guys Tony. And I have to go along
with the Guys to frame this guy
Kenny to. For those fucking Bank
robbers. I should of stayed robbing the
cars with you, at least I'm [illegible]
more money [illegible]
Ann [illegible]
Do you [illegible]

Tom I'm really sorry.
I hope to hear from you soon.
I don't know, but you're a [illegible]
stay. If you go along with us, I
will [illegible]
She will [illegible]
Good hope you do the right thing

Paul.

Q While you were in civil jail, did you write any letters to anybody?

A No, sir.

Q Didn't you once write a letter that was intercepted by Mr. Mosley, do you know?

MR. MOSLEY: What?

A A letter intercepted by Mr. Mosley?

MR. MOSLEY: I object to that, your Honor.

THE COURT: Come up here a minute.

MR. LYON: I with draw the question.

PETITIONER'S EXHIBIT 4 75 C 1613

THE COURT: What?

MR. LYON: Well, if he says "no."

THE COURT: No, no. Come up here.

(Discussion off the record between Mr. Lyon and Mr. Mosley at the bench.)

THE COURT: Strike it. The jury will disregard it. It is withdrawn, in any event.

Q Well, during the time, sir, between January of '66 and June of '66, were you writing letters to anybody?

A January 1966 to June 1966?

Q Yes.

A I believe I wrote some letters to Mr. Gillen. I don't know if it was around that time, but I wrote letters to him while I was in jail from October 8, 1965 until I was

BEST COPY AVAILABLE

released.

Q Did you write any letters to anybody else, any friends or relatives of yours?

A Just relatives.

Q You wrote to relatives?

A Yes.

Q Were you visited by friends or relatives?

A Yes, sir.

Q Didn't you ask any of your friends or relatives to try to check on where Mr. Crabbe was during July of 1965?

A No, sir.

Q By the way, do you know that in this promise you have not to be prosecuted by the Queens District Attorney, you are not promised that you will not be prosecuted for any murder other than Ernest Rupolo; do you know that?

A Yes, sir.

Q And, in other words, you're promised not to be prosecuted for any crimes committed in Queens County; isn't that right?

A Yes, sir.

Q You are not promised not to be prosecuted for murders in Queens County, except you are promised not to be prosecuted for the Ernest Rupolo murder; isn't that right?

A Yes, sir.

EXHIBIT
A
NO. 74 CR 571

PETITIONER'S
EXHIBIT
6
75 C 1613

June 15, 1966

Hello Darling

How is my wonderful lover today?
I was expecting some mail tonight, But none came over for any of us, I guess the parole officer was too busy, and didn't get a chance to censor the mail. all our, out going, in coming, mail has to be read by him I dont no what that reason is for.

As you know Elenor was up here today, to tommy was found guilty, that was no surprise, I wanted to know how much bail they put on him and etc, but that all she knew besides he gets sentenced in August. Elenor told John that he started to cry when the jury brought in the verdict of guilty. I dont no if I should believe this, they lie so much. But I wouldn't put nothing passed tommy. When I heard this I had to crack up, me and Richie had a big laugh. Richie yelled down to me, <u>he is would do a extra five years for you!</u> Thats what he told you when you gave him that letter. I just hope he doesn't get probation, that judge whats going to sentence him, is to easy going. I want him to get a little taste of jail. if he doesn't, he will always be standing on that street corner talking slick. A little time in jail would straiten him out. I just hope they give him high appeal bail, like 50,000, I know he ant going to make that. Honey in away I feel sorry for him, I know too well how jail is, its not fit for a animal. But I

know he didn't feel sorry for me.

Baby and another thing, Elmer said you read a article in the newspaper, what in turn read to him over the phone saying CO, defendents have to testify against ~~each~~ the defendants on the same case, shouldn't recive any consideration on sentencing day, (this is a new law), it sounds incredable for them to do something like this. well anyway if its true or not, this does not pertain to me, (as I am a witness.)

well love your baby got two more needles today, darn so sore I cant sit down, tomorrow I have to get two more to, I hope that will be the last, they put another new drain in today to. I wish I could see how the ear is, but it is all bandage up.

Like the highlights of the day was chicken for lunch and spaggtte for supper, I took a shower this morning and gave my cell a good cleaning, what a was way way over due. you know me I am pretty sloppy and lazy, my mother got me in that habit.

Honey I love you and miss you so very much, I feel pretty lousy today, I heard Mr H. didn't get there plate pushed up. so that means we wont be leaving here till september, that seems so far away specially under these conditions.

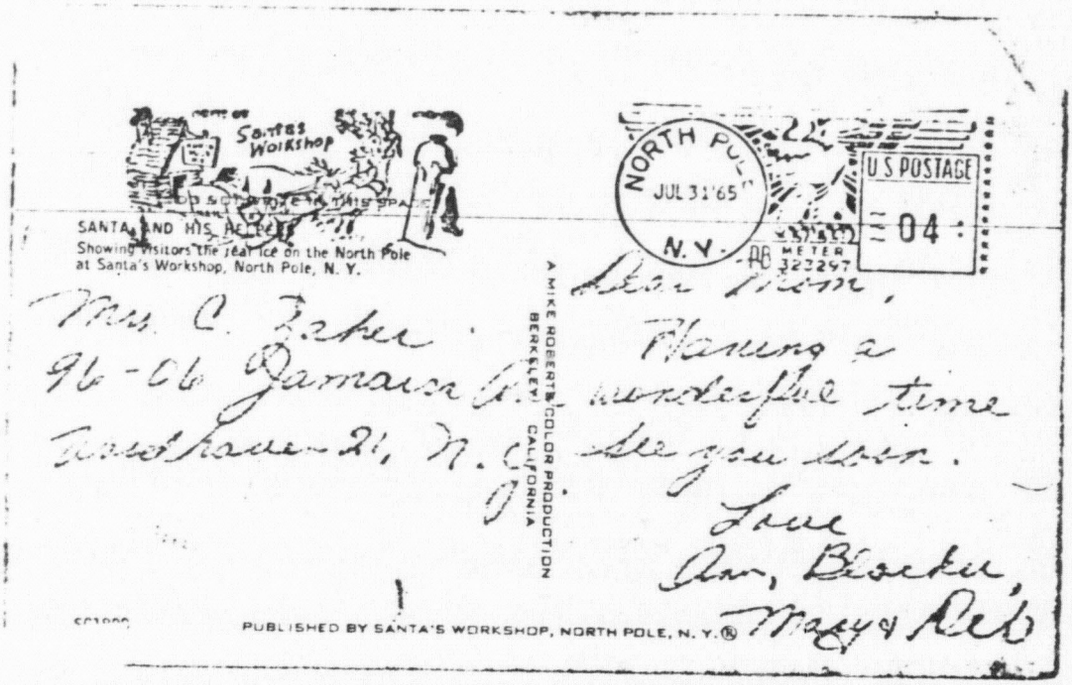
Baby I am going to say goodnight take care, I love you and need you so very much. Goodnight

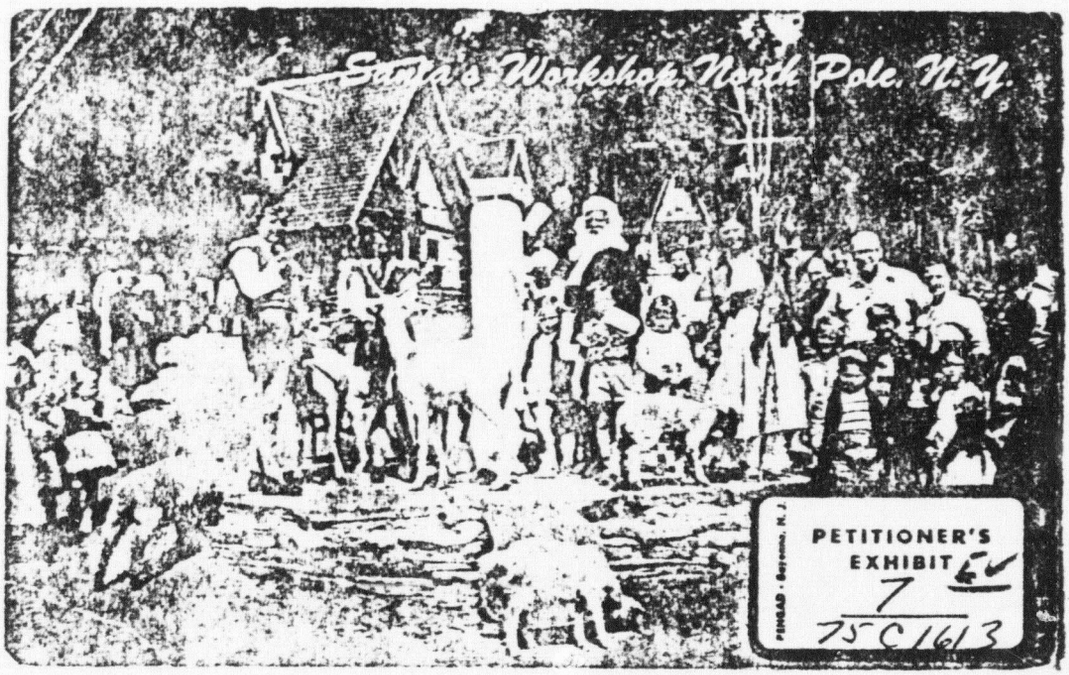
Angel

Always & forever loving you

Blank

7 - BACK AND FRONT OF POSTCARD





8 - NOTICE AND ATTACHED AFFIDAVIT OF JOHN FRANZESE

5098

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOHN FRANZESE, also known as "Sonny", et al

Defendant.

66 CR 161

S I R :

PLEASE TAKE NOTICE, that upon the affidavit of JOHN FRANZESE, one of the defendants in the above entitled action, duly sworn to the 9th day of September, 1966, and upon the indictment filed herein against John Franzese, and upon all the papers and proceedings heretofore had herein the undersigned will move this Court pursuant to Rule 17 of the Rules of Criminal Proceedure at the Criminal Motion Part thereof, to be held at 225 Johnson Street, in the Borough of Brooklyn, City and State of New York on the 26th day of September, 1966 at 10 A. M. in the forenoon of that day, or as soon thereafter as counsel can be heard for an order directing that the deposition of Charles E. Zaher Jr., in that the said Charles E. Zaher Jr. has certain information which might be pertinent to the defense of this action and is presently incarcerated by the Federal Government, be taken before a notary public.

Dated: Brooklyn, New York
September 9th, 1966

Yours, etc.
LESTER LANDY, ESQ.
Attorney for Defendant
Office & P. O. ADDress
186 Remsen St., Bklyn, N. Y

TO:
JOSEPH P. HOEY
United States Attorney, Eastern District
Office & P. O. Address
222 Johnson Street, Brooklyn, N. Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOHN FRANZESE, also known as "Sonny", et al

Defendant.

STATE OF NEW YORK)
COUNTY OF KINGS) ss:

JOHN FRANZESE, being duly sworn, deposes and says:

That I am one of the defendants in the above entitled action and I make this affidavit in support of the instant motion based upon information and belief.

I have read the indictment in the above entitled action and I am informed that three of the defendants, to wit: Richard Paul Parks, John Joseph Cordero and James Joseph Smith, have taken a plea in the above entitled action to one count in the indictment to cover the entire indictment. I am further informed and verily believe that the above mentioned three defendants are to be state witnesses in the prosecution of this case.

On or about January, 1966, at a prior trial, a person by the name of Charles E. Zaher, Jr., who was involved in a robbery of a bank, to wit: The Central Queens Savings Bank in connection with the action of the United States of America v. Anthony Polisi and Salvatore Polisi, was a witness for the prosecution.

I am further informed that in the instant action Charles E. Zaher, Jr., who is presently incarcerated in a government jail or house of detention, is not considered a witness for the prosecution. I further believe that the said Charles E. Zaher, Jr. has very pertinent information concering my position as a defendant in this action, more particularly my innocence. However, I cannot arrange to speak to him without the consent of the United States Attorney's office or this Court.

It is my firm belief that the said Charles E. Zaher, Jr. has important information which is necessary for my defense, without which I will be definitely prejudiced.

In view of the above I respectfully request that this Court make an order directing the Untied Stated Attorney's office or the appropriate agency to disclose to me where the said Charles E. Zaher, Jr. is incarcerated and that I or my legal representative be permitted to take his statement or deposition at such place of incarceration solely for the purpose of framing my defense.

WHEREFORE, it is respectfully requested that an order be made directing the United States Attorney's office to disclose the place of incarceration of Charles E. Zaher, Jr. and further that an order be made permitting his deposition or statement to be taken.

JOHN FRANZESE

Sworn to before me this
9th day of September, 1966.

[redacted]

pon herein, by delivering a true copy thereof to h personally. Deponent knew the
he therein.
erson served to be the person mentioned and described in said papers as the
worn to before me, this day of 19

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff- Appellee,

- against -

JOHN FRANZESE,
Defendant- Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 7th *day of* April *19*76 *at* **225 Cadman Plaza, Brooklyn, New York**

deponent served the annexed **Appendix ~~Brief~~** Vol I & II *upon*

David Trager

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this 7th *day of* April *19*76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer

Reuben Shearer